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In the Supreme Court of the United States

OCTOBER TERM, 1983

GERALD W. MOODY, Debtor-in-Possession,

Plaintiff-Appellant-Petitioner,

vs.

AMOCO OIL COMPANY,

Defendant-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS FOR REVIEW

This case presents novel and important issues under the Bankruptcy Code (Title 11 of the United States Code), and the Petroleum Marketing Practices Act of 1978 ("PMPA") (15 U.S.C. §§ 2801-06), a significant piece of legislation which this Court has yet to address. Review of the following issues is appropriate for the reasons articulated in Supreme Court Rule 17(1) (a) and (c).

1. Does a motor-fuel dealership contract remain executory and hence assumable pursuant to the Bankruptcy Code, 11 U.S.C. § 365, when the effective date of the termination is not until after the dealer files for bankruptcy and after the dealer attempts to cure and assume?

2. Does the failure to cure dishonored checks within five days justify termination of a motor-fuel dealership on the ground that it constitutes "evidence of financial distress," a basis not recognized in the PMPA for termination, or, does it more properly constitute a "failure to make timely payment," a termination ground specifically enumerated in the PMPA for which the dealer had a cure right of 30 days under the contract?

3. May an oil company lawfully terminate a motor-fuel dealership under the PMPA based solely on "evidence of financial distress" *when*:

(a) "Financial distress" is not one of the specifically enumerated grounds for termination under the PMPA; and

(b) Permitting termination for "financial distress" conflicts with the remedial purposes of both the PMPA and Bankruptcy Code and the Code's express prohibition against enforcement of contractual provisions designed to permit termination because of financial condition?

4. Was it "commercially reasonable" under the PMPA for Amoco to terminate two multi-million dollar motor-fuel dealerships solely because the dealer of 24-years good standing delayed more than five days in curing dishonored checks for one to two days of fuel payments ($4,379 and $13,911, respectively for the two dealerships)?

ADDITIONAL PARTY INVOLVED BELOW

Jermoo's Inc. participated in the proceedings below as petitioner Moody's co-plaintiff/appellant. As detailed herein, *infra* at n.1, Jermoo's does not join Moody on appeal because the Seventh Circuit ruled favorably on the issues pertinent to Jermoo's.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

The Seventh Circuit decision for which review is sought was argued on December 5, 1983 and decided May 14, 1984. The opinion is published, *Moody, et al.* v. *Amoco Oil Company,* 739 F.2d 1200 (7th Cir. 1984), and is set forth in the Appendix to this Petition (App. 3-34).

The Seventh Circuit denied petitioner Moody's petition for rehearing by Order dated July 3, 1984 (App. 2). The Seventh Circuit granted Moody's motion to stay the mandate on August 14, 1984 (App. 1).

Appellate jurisdiction was invoked in the Court of Appeals pursuant to 28 U.S.C. §§ 1291 and 1293(b). Jurisdiction in the district court and bankruptcy court was exercised pursuant to 28 U.S.C. §§ 1334 and 1471 and the Emergency Rule Regarding Bankruptcy Cases and Proceedings adopted by all district courts on December 24, 1982 in response to this Court's decision in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

STATEMENT OF THE CASE

I.

Facts

The Seventh Circuit's recitation of the complicated facts may be briefly summarized as follows.

Petitioner Gerald W. Moody conducts retail petroleum dealerships in Oakdale and Mauston, Wisconsin. Respondent Amoco Oil Company ("Amoco") is the franchisor for both dealerships. The dealerships are large interstate highway "plazas" consisting of a restaurant, service station, truck stop with overnight rooms and, in the case of the Oakdale dealership, a gift shop.

Each dealership is separate, and subject to separate lease and contract agreements with Amoco. There are no cross-default provisions between the contracts for the two dealerships.

Moody has been an Amoco dealer since 1958. He has won numerous awards from Amoco. Until the course of events in 1983 giving rise to this case, Moody had never been cited for a violation of a dealership agreement. The combined sale of Amoco products at the dealerships in 1983 was in excess of $10 million.

Jermoo's, Inc., the other party involved in the proceedings below,[1] conducts a wholesale petroleum operation as an Amoco jobber. Although Jermoo's, Inc., a Wisconsin corporation, is owned by Moody, they are separate legal entities. Jermoo's Amoco jobbership is a separate and freestanding franchise with no cross-default provisions or other formal ties to Moody's dealerships. In contrast to Moody's dealerships, which had always made timely payment to Amoco, the Jermoo's jobbership has been in arrears in its payments to Amoco since mid-1981.[2]

The events giving rise to this case occurred during a hectic 10-day period starting January 26, 1983. On that date, Moody's bank unexpectedly accelerated a loan upon deeming itself undersecured, seized the balance of his checking account as a setoff, and dishonored the checks that had been submitted for payment.[3]

Amoco learned the next day that the bank had dishonored several of the checks to Amoco for payment of fuel at the dealerships. Amoco verbally notified Moody that unless the checks were cured within a day, it would empty the fuel tanks at his Oakdale and Mauston dealerships and would provide no further gasoline. Amoco also mailed a Notice addressed to Jermoo's which demanded

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[1] Because the Seventh Circuit resolved the jobbership issues in favor of Jermoo's, it does not join Moody in petitioning for certiorari. An understanding of the jobbership situation is essential, however, because of the Seventh Circuit's reliance on Jermoo's jobbership problems with Amoco as the basis for terminating Moody's separate dealerships.

[2] Amoco had issued a Notice of Termination for Jermoo's jobbership in August, 1982, but subsequently withdrew it on its own motion.

[3] Moody subsequently commenced an adversary proceeding against the bank for wrongful setoff and dishonor.

that five listed checks be cured within five days. The Notice did not specify whether the checks pertained to Jermoo's jobbership or one of Moody's dealerships.

On January 28, Moody's counsel contacted Amoco to resolve the matter. Moody's counsel had bankruptcy papers ready to file. The parties agreed that Amoco would not pump the dealership tanks dry and would continue to supply gasoline on a cash basis and that Moody would not file bankruptcy pending settlement discussions.

At all times pertinent to this action, Amoco held a $22,100 cash security deposit from Moody pursuant to the dealership agreements. The deposit was greater than the total amount of all dishonored checks. Amoco elected not to apply this deposit to satisfy the dishonored checks. The dealership contracts provide that the purpose of the deposit is to protect Amoco's interest in the gasoline in the dealer's tanks. Moody has continued on a cash basis throughout the bankruptcy proceedings.

On January 29, 1983, petitioner received a five-day cure notice from Amoco which specifically referenced the Mauston dealership.

On January 31, counsel for Moody and Jermoo's met with Amoco to attempt to settle all disputes between the parties. This included the dishonored checks related to Moody's dealerships totalling $18,290 ($4,379 for Mauston; and $13,911 for Oakdale) and the arrearage on the Jermoo's jobbership.

On February 1, Amoco sent Jermoo's notice that it was terminating the jobbership contract unless Jermoo's cured the payment arrears that had existed since mid-1981. Jermoo's received the notice on February 3, 1983.

On February 2, Amoco notified counsel by telephone that the settlement proposal was unacceptable.

On February 3, Moody received a five-day cure notice from Amoco (dated February 2), listing two dishonored checks from the Oakdale dealership.

Also on February 3, Amoco sent Moody separate notices of termination for the Oakdale and Mauston dealerships (App. 40, 42). Each notice stated that two specifically identified dishonored checks (different checks for each dealership) had been received and that the five-day grace period for cure had expired. The notices further provided that "please consider this our notice to cancel [the dealership] per Paragraph 15(h) of said lease. Said cancellation is to become effective ninety-days from the date of this letter."

Paragraph 15(h) of the identical dealership leases provides in pertinent part that Amoco may terminate the lease because of:

> Declaration of bankruptcy by Lessee . . . or any other reasonably convincing evidence of financial distress of Lessee, such as, without limitation, . . . the giving of one or more Non-Sufficient Fund checks which remain dishonored after five days from the postmark date . . . of notice from Lessor to cure the dishonor, and the like.

Amoco's contract provides no right to cure or otherwise remedy a default under Paragraph 15(h). *See* Paragraph 16(e) (Paragraphs 15 and 16 of the Amoco contract are set forth in the Appendix at 35).

Paragraph 15(e) of Amoco's lease permits termination where the dealer has failed to make "timely payment." In contrast to Paragraph 15(h), where there is no right to cure or remedy the basis for termination, Amoco's lease provides the dealer 30 days within which to remedy a failure to make timely payment. *See* Paragraph 16(d). By characterizing Moody's failure to cure the NSF checks as "evidence of financial distress" under Paragraph 15(h)

rather than as a "failure to make timely payment" under Paragraph 15(e), Amoco denied Moody the opportunity to avoid termination by curing the checks within 30 days.

Moody received the Oakdale and Mauston termination notices sometime on February 4, 1983. The return receipts show that the notices were received in Mauston and Oakdale, Wisconsin at some undetermined time on February 4, 1983. Moody and Jermoo's Inc. filed separate chapter 11 bankruptcy petitions at 9:55 a.m. on February 4, 1983.

II.

Procedural Posture

Moody and Jermoo's, Inc. commenced this adversary proceeding in the Bankruptcy Court for the Western District of Wisconsin on April 14, 1983. They argued that the dealership and jobbership contracts remained executory at the time they filed for bankruptcy and were hence assumable under § 365 of the Bankruptcy Code and that the terminations of the dealerships and jobbership were wrongful and ineffective under the Petroleum Marketing Practices Act.

On June 2, 1983, the bankruptcy court entered a Memorandum Decision and Order for Judgment in favor of Amoco. The court held that the contracts could not be assumed because the contracts had been terminated prior to debtors' filing their chapter 11 petitions. The court found no basis to equitably estop Amoco from terminating Moody's dealership contracts due to the settlement negotiations. The court also found that petitioner and Jermoo's, Inc. were not entitled to injunctive relief under the PMPA because they had failed to show a "fair grounds" for litigation as required under § 2805 of the PMPA. The bankruptcy court did not enter final judgment on its Decision.

Moody and Jermoo's, Inc. filed with the district court a Motion for Withdrawal of the Reference from the Bankruptcy Court Pursuant to the Interim Rule. They also filed, either additionally or alternatively, a Notice of Appeal and Motion for Stay Pending Appeal.

The district court held an initial hearing at which it denied the motion for withdrawal of the reference and granted a stay pending its review of the bankruptcy court's decision. The court held an additional evidentiary hearing and invited the parties to supplement the record through affidavits.

On July 29, 1983, the district court affirmed the bankruptcy court's decision and remanded the case to the bankruptcy court for entry of judgment. The court held that the case was not a related proceeding within the meaning of the interim rule. The district court subsequently granted a stay pending Jermoo's and Moody's appeal to the Seventh Circuit.

On May 14, 1984, the Seventh Circuit reversed the district court on two issues, holding that the PMPA claims were "related proceedings" within the meaning of the Interim Bankruptcy Rule and that the jobbership contract between Jermoo's, Inc. and Amoco had not terminated pre-bankruptcy, and was therefore "assumable" under 11 U.S.C. § 365. The court affirmed on the other main issues, holding that Moody's two dealership contracts were not assumable because Amoco had terminated them pre-bankruptcy and that Moody had failed to establish entitlement to injunctive relief under the PMPA as to the termination of his two dealerships.

Moody's Motion for Rehearing was denied July 3, 1984. Moody's Motion to Stay the Mandate pending appeal to this Court was granted by Order dated August 14, 1984.

REASONS FOR REVIEW

I.

The Dealership Contracts Remained Executory And Assumable Under 11 U.S.C. § 365 Because The Effective Date Of Termination Was Post-Bankruptcy

It is undisputed that Amoco was stayed pursuant to 11 U.S.C. § 362 from attempting to terminate the dealerships if they were not *fully* terminated prior to the commencement of Chapter 11 proceedings. *See, e.g., Matter of Easthampton Sand & Gravel Co., Inc.*, 25 B.R. 193, 196-97 (Bankr. E.D. N.Y. 1982). It is immaterial whether the defaults giving rise to the threat of termination occurred before or after the order for relief, provided that the agreements remained in existence on the date of the bankruptcy filings. 2 *Collier On Bankruptcy*, § 365-30 (L. King, 15th ed.).

Even if, *arguendo,* Amoco's termination notices were effective pre-bankruptcy, the dealerships remained fully assumable because termination itself was not effective until well after entry of the automatic stay. Pursuant to the PMPA, which requires the franchisor oil company to provide 90-days written notice prior to termination, Amoco's notices provided that termination would be "effective" in the first week of May, 1983 for the dealerships.[4] Thus, it is undisputed that the effective date of the purported terminations was approximately three months after Moody filed for bankruptcy on February 4, 1983.

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[4] The dealership agreements also require that notice be furnished 90 days prior to the date on which the termination or non-renewal is to take effect (Lease § 16(a), App. 37-38).

The Seventh Circuit's only position on this issue is to recite the truism that contracts *fully* terminated pre-bankruptcy do not remain property of the bankruptcy estate and therefore may not be assumed (Slip Op., App. at 23). The appropriate focus, however, is on whether the dealership contracts here were validly and fully terminated prior to Moody's invocation of bankruptcy.

It is well settled that if "the termination process has not been completed . . . the trustee [or debtor-in-possession] may still assume." 2 *Collier on Bankruptcy,* § 365.04 at 265-28 to 29 (L. King, 15th ed.). The termination process had not been "completed" here because Moody filed for bankruptcy approximately ninety days prior to the effective date of the termination.

The Code defines property of the bankruptcy estate as "all legal or equitable interest in property of the Debtor as of the commencement of the case." § 541(a)(1). The franchises remained property of the estate at the time of the filing because the franchises were not then terminated as evidenced by the fact that Moody was, as he still is, in possession of the leasehold premises operating as an Amoco dealer. The Seventh Circuit's conclusion is legally flawed under the Bankruptcy Code, it is contrary to the clear Congressional policy favoring reorganization over liquidation, and it is contradicted by Amoco's own conduct in issuing more than one termination notice for Jermoo's jobbership.

The Seventh Circuit's reliance on *In re Anne Cara Oil Co., Inc.*, 32 B.R. 643 (Bankr. D. Mass. 1983) (*see* App. at 23) is misplaced. Indeed, that case directly supports Moody's position. *Anne Cara* is a dealership termination case under the PMPA where the dealer filed for bankruptcy 89 days after receiving the statutorily required 90-day termination notice and thus one day before the pur-

ported effective date of termination. After an extensive analysis of the PMPA and the Bankruptcy Code, the court concluded that the dealership was fully executory and hence assumable on the date of filing and remained that way until the effective date of termination. *Id.* at 647. The court went on to note that the debtor-dealer could avoid termination by taking some affirmative step such as attempting to cure the default and assume the contract under § 365, provided that the cure was tendered prior to the effective date of the termination. *Id.* at 648.

Moody followed the procedure recommended in *Anne Cara* for avoiding termination. Moody commenced the present adversary proceeding (including the cause of action for assumption under § 365) on April 14, 1983, approximately three weeks *prior* to the effective date of the dealership terminations. In conjunction with the commencement of this case, Moody tendered and escrowed the money necessary to fully cure the dealership arrears.[5]

The Seventh Circuit's decision destroys the ability of debtors to seek timely relief in bankruptcy to avoid termination of executory contracts and unexpired leases. Important executory contracts and leases uniformly require

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[5] It simply does not matter here whether ninety days or many years remained on the contracts at the time Moody filed for relief. The key point is that they were fully in effect and executory on the date of filing. These motor-fuel franchises are dissimilar from ordinary contracts. Under the PMPA, the dealer is entitled to renew the franchises at the expiration of each and every contract period. *Brach* v. *Amoco Oil Co.*, 677 F.2d 1213, 1219 (7th Cir. 1982). The only event that would arguably justify non-renewal here on the "shortened" 90-day contracts would be Moody's failure to pay Amoco's unsecured claim on the dishonored checks. Because Moody attempted to cure the checks and assume the dealerships when he commenced this action on April 14, 1983 (well within the ninety-day notice period prior to the purported effective date of termination), the basis for termination or non-renewal was extinguished.

notice before termination. The opportunity to cure between the time of notice and termination is occasionally, but not always granted.[6] The party terminating such an agreement obviously has complete control over when to issue a termination notice. If, as the court held below, the debtor is powerless to prevent termination by filing for bankruptcy relief, once the notice is issued, it would completely emasculate 11 U.S.C. §§ 362 and 365 and subvert the strong congressional policy favoring reorganization over liquidation. *See* H. Rep. 95-595, 95 Cong. at 220 (1977), U.S. Code Cong. & Admin. News 1978, at 5787 ("House Report"). *Cf. United States* v. *Whiting Pools, Inc.*, ... U.S. ....., 103 S. Ct. 2309, 2312-13 (1983) (11 U.S.C. § 541(a)) broadly construed in light of Congressional policy favoring reorganization to include as property of the Chapter 11 estate property seized by a creditor prior to date of bankruptcy petition). Such a result would also create a disconcerting guessing-game between the parties to executory agreements as to whether to issue a notice of termination or to file for bankruptcy before the other side can make the preemptive countervailing move. The inevitable result of such a high-stakes guessing-game will be for the parties to err on the side of hasty and precipitate action. *See In Re Taddeo*, 685 F.2d 24, 27 (2d Cir. 1982) (expressing similar concern).

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[6] In the present case, for instance, Moody had no opportunity to cure the dishonored checks after issuance of the termination notices because Amoco based termination on "evidence of financial distress," for which there is no right to cure under the contract, instead of on the "failure to make timely payment," for which the contract provided a 30-day cure period. *Compare* Paragraph 16(d) *with* 16(e) (App. 38-39). Amoco's five-day cure notices preceded the termination notices and did not state that failure to cure would trigger termination or that termination would be based on Paragraph 15(h) (evidence of financial distress) rather than on Paragraph 15(e) (failure to make timely payment).

In recognition of the strong policy favoring reorganization over liquidation, at least three circuits, including the Seventh Circuit (in a case decided after the present decision), have held that the power to cure under § 365 includes the power to revive an executory mortgage contract terminated shortly before the debtor filed for relief. *See In Re Clark,* No. 83-2269 (7th Cir. July 6, 1984); *Grubbs* v. *Houston First American Savings & Assoc.,* No. 82-2544 (en banc) (5th Cir. April 19, 1984), *reversing,* 718 F.2d 694 (5th Cir. 1983); *In Re Taddeo,* 685 F.2d 24 (2d Cir. 1982). These courts held that the debtor-mortgagor could cure defaults, revive the mortgage note and return the mortgage note to its pre-default status and amortization schedule notwithstanding the pre-bankruptcy acceleration of the mortgage note and the judgment of foreclosure. Among the several reasons offered by the Second Circuit in *Taddeo* in support of its conclusion was that:

> Conditioning a debtors' right to cure on its having filed a Chapter . . . petition prior to acceleration would prompt unseemly and wasteful races to the courthouse. Worse, these would be races in which mortgagees possess an unwarranted and likely insurmountable advantage . . . . In contrast, permitting debtors in the Taddeos' position to deaccelerate by payment of the arrearages *will encourage parties to negotiate in good faith* rather than having to fear that the mortgagee will tip the balance irrevocably by accelerating or that the debtor may prevent or at least long postpone this by filing a Chapter . . . petition.

(emphasis added) *Id.* at 27.

Such reasoning is directly applicable to this case. Moody had a Chapter 11 petition prepared and ready to file on January 28, 1983. Instead of filing it, he agreed to negotiate with Amoco in regard to the dishonored checks on the dealerships. As feared by the *Taddeo* court, the instant such negotiations broke down, it became a race to see whether Amoco could terminate the franchises before

Moody could reach the courthouse. Such a race is unseemly and ties important rights of the debtor and his estate and creditors to the purely fortuitous fact of which party to the dealerships acted more swiftly. Such a conclusion also penalizes Moody for having negotiated with Amoco in a good faith effort to avoid the need for seeking bankruptcy relief. The power to cure and reinstate should be used here to advance the strong Congressional policy favoring rehabilitation and reorganization over liquidation. *See, e.g.,* House Report, *supra,* at 220; *Accord NLRB* v. *Bildisco & Bildisco,* ..... U.S. ....., 104 S. Ct. 1188, 1197 (1984).

The Seventh Circuit's attempt in this case to distinguish *Taddeo* is unavailing in light of *Grubbs* and the Seventh Circuit's own subsequent decision in *Clark.*[7] The court below distinguished *Taddeo* on the basis that the mortgage was not fully terminated pre-bankruptcy because the debtor/mortgagor "could have avoided foreclosure by paying off the full amount of the mortgage" (App. at 26). What the court overlooks is that paying off the full amount of an accelerated mortgage note does not revive any rights in the mortgage note nor does the fact that a mortgagee can escape foreclosure by paying off the full amount of the mortgage mean that the mortgage note remained executory. The Seventh Circuit has confused the remedy of foreclosure with the executory relationship of the contract. Paying off the note eliminates the necessity of exercising the remedy of foreclosure, but it does not continue the executory relationship of the mortgage note. Indeed, it terminates it. Further, in *Taddeo, Grubbs* and *Clark* the debtor did exactly what the debtor here is attempting to do—remedy the default of an executory contract (the note) and return the contract to its pre-default status.

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[7] Indeed, in attempting to distinguish *Taddeo* in this case, the Seventh Circuit relies on the district court decision in *Clark* which it subsequently reversed (Slip Op., App. at 26).

II.

The Seventh Circuit's Decision Contravenes The Spirit And Purpose Of The PMPA, And Makes Bad Law

A. Purpose of the PMPA

Congress enacted the PMPA to protect "franchisees from arbitrary or discriminatory termination or non-renewal of their franchises." S. Rep. No. 95-731, 95th Cong., 2d Sess. 15, reprinted in [1978] U.S. Code Cong. & Ad. News 873, 874. *Accord Brach* v. *Amoco Oil Company,* 677 F.2d 1213, 1216 (7th Cir. 1982). As noted by the Seventh Circuit in *Brach*:

> Congress recognized the disparity of bargaining power between franchisor and franchisee and the harsh consequences of suddenly terminating a business for which the franchisee has worked long and hard to develop goodwill. *See* 123 Cong. Rec. 10386 (1977) (remarks of Rep. Mikva). Echoing those concerns, the PMPA commits gasoline franchisors to a franchise marriage of sorts, the dissolution of which is available only on specific grounds.

Id. at 1220.

As remedial legislation, the PMPA "must be given a liberal construction consistent with its overriding purpose to protect franchisees." *Id.* at 1221, *citing United States* v. *Bacto-Unidisk,* 394 U.S. 784, 798 (1969). As demonstrated below, the Seventh Circuit failed in this case to carry out the Congressional intent underlying the PMPA.

B. The Seventh Circuit Erred In Denying Injunctive Relief Under The PMPA

The PMPA provides that the court "shall" grant a preliminary injunction if:

(A) The franchisee shows:

> (i) the franchise of which he is a party has been terminated or the franchise relationship of which he is a party has not been renewed, and
>
> (ii) there exists sufficiently serious questions going to the merits to make such questions a fair ground for litigation; and
>
> (B) the Court determines that, on balance, the hardships imposed upon the franchisor by the issuance of such preliminary injunction relief, will be less than the hardship which would be imposed upon such franchisee if such preliminary injunctive relief were not granted.

15 U.S.C. § 2805.

It is undisputed, as found by the courts below, that Moody has satisfied section (A)(i) (fact of termination) and (B) (balance of hardship favors issuance of injunction) of the test. The sole issue is whether the courts below erred in denying injunctive relief on the ground that Moody had failed to demonstrate a "fair ground for litigation" under § 2805(A)(ii). As acknowledged by the Seventh Circuit, the standard for issuing relief under the PMPA is substantially lighter than under Fed.R.Civ.P. 65 (App. at 31). Rather than having to show a "strong" or "reasonable" likelihood of success, the Dealer need only show "a fair ground of litigation." Such clearly exists in regard to the following issues.

1. Moody Was Entitled To A 30-Day Cure Period Because The Dishonored Check Problem Should Have Been Construed As "Failure To Make Timely Payment" Rather Than As "Evidence Of Financial Distress"

As noted by the Seventh Circuit, Amoco's basis for terminating Moody's dealerships was evidence that they were in "financial distress" because of failure to cure

certain dishonored checks within five days of written demand (App. at 30). The checks in question—two for each dealership—totalled $4,379.62 for the Mauston dealership and $13,911.83 for the Oakdale dealership.

Amoco's notices of termination were expressly issued pursuant to Paragraph 15(h) of the dealership leases which provides:

> 15. Lessor shall have the right to terminate or non-renew this lease, and any applicable franchise relationship under the Petroleum Marketing Practices Act or other applicable federal, state or local act of a similar nature, if any of the following events shall occur:
>
> . . .
>
> (h) Declaration of bankruptcy by Lessee, judicial determination that Lessee is bankrupt or insolvent or any other reasonably convincing evidence of financial distress of Lessee, such as without limitation, appointment of a receiver for Lessee, assignment by Lessee for the benefit of creditors, giving of one or more Non Sufficient Fund Checks which remain dishonored after five days from the postmark date (or, in the case of hand delivery, date of personal delivery) of notice from Lessor to cure the dishonor, and the like.

(App. at 35-36) (*see* Slip Op., App. at 7).

The termination notices were not issued pursuant to Paragraph 15(e), which permits termination because of "[f]ailure by Lessee to pay Lessor in a timely manner when due all sums to which Lessor is legally entitled." The significance of Amoco's election to proceed under Paragraph 15(h) rather than 15(e) is two-fold. First, "evidence of financial distress" is not one of the enumerated grounds for termination under the PMPA (*compare* contract ¶ 15(h) *with* 15 U.S.C. § 2802(2)). "Failure to

make timely payment" is a recognized basis for termination under the PMPA. *See* 15 U.S.C. § 2802(8). Second, Amoco's contract gives the dealer 30 days within which to avoid termination by curing a failure to make timely payment (Paragraph 16[d]), but no right to remedy the default giving rise to a termination based on "evidence of financial distress" (Paragraph 16[e]).

The timely payment provision was not relied upon by Amoco because, as already noted, the contract expressly provides that Moody had 30 days to cure any failure to make timely payment (*see* Lease Paragraph 16(d) referring to Paragraph 15(e)). Had Amoco provided the 30-day cure period for termination under Paragraph 15(e), the cure period would have extended past Moody's filing for bankruptcy, and, as expressly found by the Seventh Circuit in regard to Jermoo's jobbership, the contracts would therefore have remained executory and thus assumable. *See* Slip Op., App. at 27-30).

The Seventh Circuit's decision accords a franchisor more discretion in terminating a dealer for failure to cure a dishonored check within five days (even a check for one dollar) on the basis and rhetoric of "financial distress," a ground not enumerated in the PMPA, than would be permitted for the same failure under the "timely payment" standard, a ground for termination that is specifically allowed in the PMPA. Such a result is inconsistent with *Brach* and the remedial purposes of both the PMPA, *see Brach*, at 1230, and the Bankruptcy Code. *See NLRB* v. *Bildisco & Bildisco*, 104 S. Ct. at 1197.

Where the franchisee's sole default is failure to cure a dishonored check in five days, it is patently unfair to characterize the payment default as "evidence of financial distress," for which there is no right of cure (Paragraphs 15(h) and 16(e)), rather than as failure to make timely

payment. Under the court's construction, Moody would have been better off refusing to even attempt to pay than in writing a check which was subsequently dishonored because of an unanticipated bank setoff.

2. "Evidence Of Financial Distress" Is An Inappropriate Basis For Termination Under The PMPA

Lease Paragraph 15(h), other than the reference to "evidence of financial distress," has a verbatim counterpart in the PMPA, *see* 15 U.S.C. § 2802(c)(2), and is essentially a bankruptcy termination clause. The PMPA became effective on June 19, 1978, more than one year before section 365 of the Bankruptcy Reform Act of 1978 took effect on October 1, 1979. Bankruptcy termination clauses were generally enforceable under the old bankruptcy law in effect when the PMPA was enacted. *See* 11 U.S.C. § 110 (superseded); *Finn* v. *Meigham*, 325 U.S. 300 (1945). The legislative history accompanying 15 U.S.C. § 2802 contains no discussion of why Congress included bankruptcy as an event which makes franchise termination or nonrenewal reasonable under the PMPA. *See generally*, Pub. L. 95-297, *reprinted in* 1978 U.S. Code Cong. & Admin. News, 873, 896. Presumably, Congress's only intent was to track the bankruptcy law then in effect.

In a significant departure from prior bankruptcy law, 11 U.S.C. § 365(e)(1) protects executory contracts and unexpired leases from being terminated due to bankruptcy "[n]otwithstanding a provision in an executory contract or unexpired lease, or in applicable law . . . ." Thus, Amoco could not have terminated the contracts solely because of bankruptcy regardless of the bankruptcy termination clauses in the leases and the PMPA. The legislative history

underlying § 365(e)(1) bolsters this view.[8] Regardless of whether it is characterized as "financial distress," "declaration of bankruptcy" or a "determination of insolvency," what the Seventh Circuit has done is to legitimate Amoco's enforcement of a bankruptcy termination clause.

It is illogical to construe Lease Paragraph 15(h) to permit termination for a relatively minor type of financial distress, *i.e.*, failure to cure a dishonored check within five days, but not for much more convincing evidence of financial distress such as declaration of bankruptcy. Such a construction is clearly strained. The failure to timely cure a dishonored check is more appropriately characterized as a type of "failure to make timely payment," a recognized ground for termination under both the PMPA and the Amoco leases. The latter ground, as discussed above, would have allowed Moody 30 days to cure. *See* Slip. Op., App. at 27-30, *citing* 15 U.S.C. § 2802(c); *see also* Lease Paragraph 15(e). As such, it should be evaluated as a basis for termination under the timely payment standards articulated in *Brach* v. *Amoco Oil Company*, 677 F.2d 1213, 1221 (7th Cir. 1982).

The Seventh Circuit recognized Congress's admonition both here and in *Brach* that "events which are not enumer-

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[8] Section 365(3)(1) was largely motivated by Congressional recognition that enforcement of bankruptcy termination clauses frustrates the debtor's rehabilitation or liquidation. H.R. Rep. No. 595, 95th Cong., 1st Sess. 347, 348 (1977) 59 (1978) [Senate Report]; The Commission on the Bankruptcy Laws of the United States, Part 1, H.R. Doc. No. 137, 93rd Cong., 1st Sess. 198, 198-99 (1973) [Commission Report]. Although the Commission on the Bankruptcy Laws recommended that bankruptcy termination clauses continue to be enforceable in liquidation cases (Commission Report at 199), Congress evidently did not agree because § 365(e)(1) makes no distinction between reorganization and liquidation cases.

ated in subsection (c) must be carefully scrutinized by the Courts prior to a determination that the statutory standards set forth in § 2802(c)(2)(C) have been satisfied" (*Brach,* 677 F.2d at 1219; Slip Op., App. at 32). This is especially true when the alleged ground is contrary to the Bankruptcy Code's prohibition against *ipso facto* termination clauses. The Bankruptcy Code would have little if any rehabilitative potential if the most basic of all reasons for bankruptcy, "financial distress," is a proper ground for termination.

3. The One-Time Dishonored Check Problem Was Not A Commercially Reasonable Basis For Termination

Even where one of the exceptions to the general prohibition against franchise termination in the PMPA is otherwise applicable, termination is prohibited where:

> The failure giving rise to the attempted termination 'is only technical or unimportant to the franchise relationship' (15 U.S.C. § 2801(13)(A)).

Given the special circumstances of this case, and the pendency of negotiations with Amoco, Moody's failure to immediately cure the relatively minor dishonored checks prior to February 4, 1983 was not critical to the overall franchise relationship. Termination under the PMPA for untimely payment is:

> . . . [s]ubject to the 'prevailing commercial or industrial trade practices' [*Quoting*] PMPA Senate Report at 38, U.S. Code Cong. & Ad. News at 896, which further suggests that events in the nature of contract violations must be assessed by an independent analysis of reasonableness and materiality.

Brach v. *Amoco Oil Co.,* 677 F.2d at 1221. *Accord, Comment Retail Gasoline Franchise Termination and Non-*

renewals Under Title 1 of The PMPA, 1980 Duke L.J. 522, 541-44 (and cases cited therein).

The purported failure of timely payment here was not one of substantial or chronic arrears; rather, the one-time dishonorment problem stemmed solely from the precipitate actions of Moody's bank. The PMPA's timely payment provision "is more intended to cover the potential problem of *repeated* lateness or arrearage" (emphasis added) *Brach*, 677 F.2d at 1221, rather than the situation in the present case.

Moody made timely payment to Amoco at all other times throughout the 24-year history of his dealings with Amoco (Slip Op., App. at 5). Moreover, since the commencement of this action, Moody has been fully prepared and willing to cure the dishonorments. Accepting Amoco's position here would directly contravene the spirit and letter of the PMPA in that it would legitimize the termination of a long-standing multi-million dollar operation like the Mauston dealership for failure to immediately cure *ANY* dishonorment, whether it be for one dollar or, as here, $4,379. Surely, that was not the intent of Congress. Moody is entitled to injunctive protection pending proof of his claim.

"[A]n independent analysis of [the] reasonableness and materiality" of terminating these multi-million dollar operations due to the dishonorment, in light of the facts of this case and the "prevailing commercial [and] trade practices," indicates that Moody had at least a fair ground for litigation as to whether a valid basis exists for termination. *Brach*, 677 F.2d at 1221. For instance:

> (i) The total amounts owed Amoco by the two dealerships for the dishonored checks ($4,379 for Mauston; and $13,911 for Oakdale) are so insignificant in relation to the total volume of sales at the franchises

—which together have averaged well over $10 million a year in gross revenues—that the failure to immediately cure can only be deemed technical and unimportant to the franchise relationships.

(ii) The dishonored checks related to payments to Amoco for product pursuant to the Meter Marketing Program. At the time of the check dishonorment Amoco held a cash meter marketing deposit from Moody in excess of the amount of the dishonored checks which more than protected it from any real loss due to the dishonorment. This deposit was, *by contract,* available to Amoco for payment of the dishonorments. The need for a cash deposit to assure payment for product was eliminated once Moody was placed on daily cash payment terms so Amoco had no reason to refrain from using the deposit to cure the dishonorments.

The Seventh Circuit rejected Moody's argument regarding the failure to cure the non-sufficient fund checks, which it admitted were minor in relation to the volume of business conducted at the two dealerships, because "*debtors* had owed Amoco a large sum on the jobbership for some time" (emphasis added) (Slip Op., App. at 33). In response to Moody's contention that the failure to cure the NSF checks was "technical or unimportant" within the meaning of the PMPA, 15 U.S.C. § 2801(13)(B), the Seventh Circuit reasoned that "*debtors* giving of a number of dishonored checks, *coupled* with the substantial arrearages under the jobbership contract, is not technical or unimportant" (emphasis added) (*Id.*). The court's conclusion in this regard was apparently premised on the mistaken assumption that debtor Jermoo's, Inc., which owns and operates only the jobbership, is also the owner of the dealerships.

Although Jermoo's, Inc. is owned by Moody, they are separate legal entities. Each filed separate bankruptcy petitions and schedules (Case Nos. LM-11-83-00167 and LM-11-83-00168, respectively), and each has its own estate and group of creditors. Their separate Chapter 11 proceedings have not been consolidated, and each continues to function as separate debtors-in-possession.

The only interest of Jermoo's in this case is the jobbership. Moody is the dealer under the pertinent agreements with Amoco and has been since 1958 (Slip Op., App. at 5). The court discussed Jermoo's jobbership separately from Moody's dealerships "because the dealerships and the jobbership are subject to separate agreements between the parties . . ." (*Id.* at 4). Amoco conducts business with Jermoo's and Moody at separate business addresses. As also noted in the court's opinion: "[e]ach dealership is separate and subject to a separate set of lease and contract agreements [and] [t]here are no cross-default provisions among the dealership contracts" (*Id.* at 4-5).

Nevertheless, having emphasized the separate and free-standing nature of the dealership and jobbership contracts, the Seventh Circuit permitted Amoco to terminate Moody's financially healthy dealership franchises based on evidence that the separate and distinct jobbership franchise owned by Jermoo's Inc. was in financial distress. Surely Congress did not intend that an economically healthy dealership franchise could be terminated under the PMPA for the financial distress of a different franchise owned by a separate legal entity.

Even if one disregards the undisputed fact that the jobbership is a separate and distinct contract apart from the dealerships with no cross-default provisions and is owned by a legal entity other than the dealership franchisee, it is difficult to understand how the jobbership arrearage is evidence of the dealerships' "financial dis-

tress." The arrearage on the jobbership had existed since September, 1981, and, in fact, had slightly decreased by the time the dealership terminations occurred a year and one-half later in February of 1983 (App. at 8). In other words, the purported evidence of financial distress had existed for over one year without having prompted Amoco to take any action on the dealerships. Ironically, the court's decision permits Jermoo's to keep the jobbership while terminating Moody's economically healthy dealerships because of the financial distress of the jobbership.

Stripped of the unrelated jobbership arrearage as a basis for terminating the dealerships, it is respectfully submitted that, at the very least, a "fair ground of litigation" exists as to whether the relatively minor dishonored checks constituted an independently sufficient basis for terminating the valuable dealership franchises. The record is barren of any evidence that the dealerships themselves were in any financial distress.[9]

Finally, even if "financial distress" were a proper basis for termination under the PMPA, the Seventh Circuit erred in affirming on that basis because neither the district court or bankruptcy court had even addressed the issue. In exercising its "independent assessment of the issues" the district court purported to review the bankruptcy court's decision in detail and adopted the reasoning of the bankruptcy court's decision in full. The bankruptcy court's

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[9] Indeed, the only evidence is to the contrary. As noted in the Court's opinion, Amoco was fully protected on the NSF checks by virtue of Moody's meter marketing deposit which exceeded the total amount of the dishonored checks (App. at 8 n.5). The insignificance of the check problem from Amoco's perspective is also evidenced by the fact that it chose not to terminate a smaller third dealership owned by Moody (Tomah dealership) despite the fact that the identical NSF check problem existed in regard to that dealership (App. at 4-5).

decision contains no mention of financial distress as the basis for termination. *See Matter of Moody,* 31 B.R. 216 (Bankr. W.D.Wis. 1983). Indeed, the bankruptcy court had mistakenly focused on Lease Paragraph 5(b) (pertaining to payment of rent) rather than failure to cure fuel payment checks in accordance with Paragraph 15(e) or (h). The bankruptcy court denied injunctive relief to Moody because of a perceived failure to make "timely payment," not because of any evidence of "financial distress." 31 B.R. at 221-27. This record therefore provides no basis for the special deference the Seventh Circuit accorded to the decision of the courts below to deny injunctive relief (App. at 31).

CONCLUSION

Petitioner Gerald W. Moody respectfully submits that this case is appropriate for review under the criteria articulated in Supreme Court Rule 17, and urges that the Court grant certiorari. The appeal presents important issues under the Bankruptcy Code and the Petroleum Marketing Practices Act of 1978, a significant piece of legislation which this Court has yet to address.

Dated this 14th day of September, 1984.

By .....

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
August 14, 1984.

Before

Hon. Joel M. Flaum, Circuit Judge
Hon. _____
Hon. _____

IN THE MATTER OF:
GERALD W. MOODY & JERMOO'S
INCORPORATED,
Debtors-Appellants

No. 83-2457

Appeal from the United States District Court for the
Western District of Wisconsin
No. 83 C 538
Judge John Shabaz

This matter comes before the court for its consideration of the following documents:

1. "MOTION TO STAY THE MANDATE" filed herein on July 9, 1984, by counsel for the appellant, Gerald W. Moody.

2. "RESPONSE OF AMOCO OIL COMPANY TO MOTION TO STAY THE MANDATE" filed herein on July 16, 1984, by counsel for the Amoco Oil Company.

On consideration thereof,

IT IS ORDERED that the "MOTION TO STAY THE MANDATE" is hereby GRANTED and the mandate of this court is hereby STAYED to and including September 14, 1984.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
July 3, 1984
Before
Hon. William J. Bauer, Circuit Judge
Hon. Joel M. Flaum, Circuit Judge
Hon. Terence T. Evans, District Judge*

GERALD W. MOODY and JERMOO'S INCORPORATED,

Plaintiffs-Appellants,

No. 83-2457 vs.

AMOCO OIL COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Wisconsin
No. 83-C-538(S)
John C. Shabaz, Judge

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by Plaintiff-Appellant Gerald W. Moody, no judge in active service** has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Terence T. Evans, United States District Judge of the Eastern District of Wisconsin, is sitting by designation.

** Chief Judge Walter J. Cummings and Judge Wilbur F. Pell, Jr. did not participate in the consideration of the petition for rehearing or suggestion for rehearing *in banc*.

In the

United States Court of Appeals

For the Seventh Circuit

No. 83-2457

GERALD W. MOODY,

and

JERMOO'S INCORPORATED,

Debtors-in-Possession,
Plaintiffs-Appellants,

v.

AMOCO OIL COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Wisconsin.

No. 83-C-538(S)—*John C. Shabaz,* Judge

ARGUED DECEMBER 5, 1983—DECIDED MAY 14, 1984

Before BAUER, FLAUM, *Circuit Judges* and EVANS, *District Judge.**

FLAUM, *Circuit Judge.* This appeal raises a number of issues arising under the interim bankruptcy rule (interim rule) adopted by the district courts of this circuit, the Bankruptcy Reform Act of 1978 (codified at 11 U.S.C. and scattered sections of the United States Code), and the Petroleum Marketing Practices Act of 1978 (PMPA), 15

* The Honorable Terence T. Evans, United States District Judge of the Eastern District of Wisconsin, sitting by designation.

U.S.C. §§ 2801-2806 (1982). The appeal involves an adversary proceeding arising out of debtors' reorganization cases filed under chapter 11 of the Bankruptcy Code. The bankruptcy court held both that debtors could not assume certain allegedly executory contracts and that debtors were not entitled to preliminary injunctive relief under the PMPA. The district court affirmed the bankruptcy court's order and remanded the case to the bankruptcy court for entry of final judgment. Because we hold that debtors' claim for relief under the PMPA is a "related proceeding" within the meaning of the interim rule, we reverse that portion of the district court's opinion remanding the PMPA claim to the bankruptcy court. We also reverse the district court's holding that debtors may not assume the jobbership contract. We affirm the remainder of the district court's opinion.

I. Facts

Appellants Gerald W. Moody and his solely-owned business Jermoo's, Inc., ("debtors") conduct retail petroleum dealerships ("the dealerships") at three separate locations in Wisconsin. Appellee Amoco Oil Company ("Amoco") is the supplier and franchisor for each location. Debtors also conduct wholesale petroleum operations as an Amoco jobber ("the jobbership"). Because the dealerships and the jobbership are subject to separate agreements between the parties, we will discuss them separately.

A. The Dealerships

Debtors' dealerships are located in Oakdale, Mauston, and Tomah, Wisconsin.[1] Each dealership is separate and

[1] As to Oakdale, debtors hold title to the land and truck stop, gift shop, and restaurant improvements; Amoco holds title to the

(footnote continued)

subject to a separate set of lease and contract agreements.[2] There are no cross-default provisions among the dealership contracts. Debtor Moody has been an Amoco dealer since 1958. He has won numerous awards from Amoco. Until the course of events giving rise to this appeal, he had never been cited for any violation of any dealership agreements.

Debtors allege that on January 26, 1983, their bank accelerated a loan to debtors and seized the balance in their checking account as a setoff. The bank subsequently dishonored all checks submitted for payment.[3]

On January 27, 1983, Amoco was notified that certain checks given to it by debtors for payment for fuel had been dishonored. The same day, Amoco verbally notified debtors of the dishonored checks. Amoco told debtors that unless the checks were cured by the next day, Amoco would pump dry the fuel tanks at Oakdale and Mauston and would provide no further gasoline to debtors until the checks were cured. Amoco testified that this was

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(footnote continued)

service station improvements. As to Mauston, Amoco holds title to the land and the truck stop, restaurant, and service station improvements. As to Tomah, debtors hold title to the land and the service station improvements. Amoco has not sought to terminate the dealership at Tomah.

[2] The Oakdale dealer lease was renewed in April 1981 for a term to run until June 30, 1984. The Mauston dealer lease was renewed in October 1982 for a term to run until May 31, 1985. The PMPA applies to the termination of these franchises. 15 U.S.C. §2802(b)(1)(1982).

[3] On April 11, 1983, debtors brought an adversary proceeding against their bank, alleging wrongful closing of their account, unlawful setoff, and wrongful dishonor. That proceeding is not now before this court.

standard practice and pursuant to written agreement between the parties.[4] Amoco also mailed to debtors a demand that debtors cure the dishonored checks within five days. The five-day cure notice was addressed to Mr. Moody, Jermoo's Inc., at Mauston. That notice listed five checks as dishonored. The return receipt completed by Amoco refers to the addressee as "jobber." The five-day cure notice did not specify which check pertained to which dealership or jobbership.

Debtors state that on January 27, they executed chapter 11 petitions in bankruptcy and instructed their counsel to file them the next day.

On January 28, debtors' counsel contacted Amoco. The parties agreed that Amoco would not pump its tanks dry and would continue to supply gasoline to debtors while debtors attempted to put together a settlement proposal. Debtors state that they told Amoco that they would file under chapter 11 that day unless Amoco agreed not to pump the tanks. Debtors state that Amoco agreed to maintain "the status quo." Debtors allege that, acting on the advice of their counsel, they waited to cure the checks because of the standstill agreement. Amoco states that the standstill agreement pertained only to Amoco continuing to supply gasoline; there was no standstill agreement as to the cure period for the dishonored checks.

On January 29, 1983, debtors received the five-day cure notice from Amoco.

On January 31, debtors' counsel met with Amoco to attempt to settle all disputes between the parties. On

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[4] *See* Meter Marketing Plan Rider ¶ 5 to Dealer Supply Agreements, Bankruptcy Exhibit 1 ("[f]ailure of Dealer to make payment in cash when due or demanded shall entitle Amoco to suspend deliveries, to enter upon the premises and lock the dispensing equipment pending removal of its products . . .").

February 2, Amoco notified debtors' counsel that the settlement proposal was unacceptable. On February 3, debtors received a cure notice from Amoco, by certified mail (dated February 2), listing two dishonored checks from the Oakdale dealership and demanding cure within five days.

Also on February 3, Amoco sent by certified mail two separate termination notices to debtors. The first pertained to Oakdale. It stated that two dishonored checks had been received and that the five-day grace period for cure had expired. The notice further provided that "additional N.S.F. checks have been received and at this time constitute further contract violations. Please consider this our notice to cancel [the Oakdale dealership] per Paragraph 15h of said lease. Said cancellation is to become effective ninety-days from the date of this letter." The letter included a summary statement of the PMPA, as required under the PMPA. The notice as to Mauston was identical, but it identified two other checks as dishonored. It was addressed to Mr. Moody at "Hwy. 82 & I-90/94" in Mauston.

Paragraph 15h of each lease provides that Amoco may terminate the lease because of:

> [a]ny other reasonably convincing evidence of financial distress of Lessee, such as, without limitation, . . . the giving of one or more Non Sufficient Fund checks which remain dishonored after five days from the postmark date . . . of notice from Lessor to cure the dishonor, and the like.

The leases also provide that "[t]he postmark date shall be the date of any notice sent by certified mail." Finally, the leases state that any notice sent to the lessee shall be sent to the address as shown in the lease. The Mauston lease shows Moody's address as 105 Murphy Drive in Mauston.

Sometime on February 4, 1983, debtors received the Oakdale and Mauston termination notices. The return receipt shows a postmark date of February 4 as the date received. Debtors filed their chapter 11 petition on February 4.

Moody testified that debtors could not have cured the checks during the five-day cure period, but that debtors have been ready, willing, and able to cure since the commencement of the instant adversary proceeding.[5]

B. The Jobbership

By certified letter dated August 3, 1982, Amoco notified debtors that it elected to terminate and nonrenew the jobbership effective November 3, 1982. Amoco gave as its reason more than $230,000 in arrearages in the jobbership account that had existed since September 1981. Amoco later withdrew the termination notice and extended the deadline for payment of the arrearages into 1983. By certified letter dated February 1, 1983, Amoco issued a new notice of termination as to the jobbership, to be effective May 6, 1983. Debtors received the notice on February 3, 1983. The notice provided that the debtors had fifteen days from the postmark date of the letter to cure the default. Debtors did not cure the arrearages within the fifteen days and have not cured to date.

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[5] At all times, Amoco has held a $22,100 cash security deposit from debtors pursuant to the dealership agreements. Amoco elected not to apply this deposit to satisfy the dishonored checks. Amoco has stated that the purpose of the deposit is to protect Amoco's interest in the gasoline in the dealer's tanks. Amoco states that a dealer must have a security deposit with Amoco in order to receive any products. Amoco has asserted that if it had applied debtors' security deposit to cover the dishonored checks, it would have had to stop delivering products to debtors. Appellee's Brief at 8-9.

C. Procedural History

Debtors commenced this adversary proceeding in bankruptcy court on April 14, 1983. They argued that they could assume the dealership and jobbership contracts under section 365 of the Bankruptcy Code and that the terminations of the dealerships and jobbership were wrongful and ineffective under the PMPA.[6]

A full-day evidentiary hearing was held before the bankruptcy court on May 18, 1983.[7] On June 2, 1983, the bankruptcy court entered a Memorandum Decision and Order for Judgment in favor of Amoco. The court held that the contracts could not be assumed because the contracts had been terminated prior to debtors' filing their chapter 11 petitions. The court found no basis to equitably estop Amoco to terminate the contracts. The court also found that debtors were not entitled to injunctive relief under the PMPA. Debtors had failed to show any serious question as to "fair grounds" for litigation as required under section 2805 of the PMPA. The bankruptcy court did not enter final judgment on its decision.

On June 3, 1983, debtors filed with the district court a motion for withdrawal of the reference from the bankruptcy court pursuant to the interim rule. Debtors also

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[6] Debtors also raised several issues under the Wisconsin Fair Dealership Law, Wis. Stat. §§ 135.01-.07 (1974 & Supp. 1983). The bankruptcy court rejected their claims. Debtors have not appealed this ruling.

[7] On February 9, 1983, the bankruptcy judge held that the interim rule was unconstitutional and that therefore he had no jurisdiction over matters arising in post-December 24, 1982, proceedings. Debtors brought a mandamus action against the judge in the district court. On March 7, 1983, the district court held for debtors and ordered the bankruptcy judge to exercise jurisdiction according to the interim rule. *Moody* v. *Martin*, 27 B.R 991 (W.D. Wis. 1983).

filed, either additionally or alternatively, a notice of appeal and motion for stay pending appeal.

The district court held an initial hearing. The court denied as untimely the motion for withdrawal of the reference. The court held an additional evidentiary hearing and invited the parties to supplement the record through affidavits.

On July 29, 1983, the district court affirmed the bankruptcy court's decision and remanded the case to the bankruptcy court for entry of judgment. The court held that this case is not a related proceeding within the meaning of the interim rule. Debtors appealed.

The parties' arguments on appeal to this court may be summarized as follows. Debtors argue that this case presents a "related proceeding" within the meaning of the interim rule. The district court did not exercise the appropriate standard of review of the bankruptcy court's order. Debtors may assume the dealership contracts because the contracts were not properly and timely terminated. Even if the contracts were terminated, they may be assumed because section 365 of the Bankruptcy Code allows revival of a terminated contract. Debtors argue that they may assume the jobbership contract despite their failure to cure the defaults within sixty days after filing for reorganization. Finally, termination of the contracts should be enjoined under the PMPA.

In response, Amoco argues that this case is not a related proceeding and that even if it is, the district court's review of the bankruptcy court order was proper. A contract that is properly terminated pre-bankruptcy may not be revived or assumed. Debtors' failure timely to cure the defaults in the jobbership contract preclude its assumption. The bankruptcy court and the district court did not abuse their discretion in not enjoining the terminations under the PMPA.

II. The Interim Rule

A. Related Proceeding

Debtors argue that their action to assume the dealership and jobbership contracts and to receive preliminary injunctive relief is a "related proceeding" under the interim rule. They argue that the dispositive issue in the case is whether the contracts were properly terminated pre-bankruptcy, which is a matter of state law; the question of assumption is dependent on and collateral to the question of termination. The question of entitlement to injunctive relief is governed solely by the PMPA. Thus, debtors argue, this case is not a traditional bankruptcy case but rather is a related proceeding.

Amoco argues that the issues of termination and injunctive relief under the PMPA are presented solely in the context of debtors' right to assume the contracts. It argues that assumption is a contested matter concerning assets and administration of the estate; additionally, since Amoco is a creditor of the estate, the case is similar to a counterclaim by the estate. Thus, this case does not fit the definition of a related proceeding within the meaning of the interim rule.

The district court held that this case is not a related proceeding. The court defined a related proceeding as one where a debtor brings a noncreditor into bankruptcy court concerning an issue that is not related to the issues of the bankruptcy. Here, the issue of assumability of the contracts is a bankruptcy question and Amoco was a creditor.

In *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the Supreme Court held unconstitutional as a violation of article III the vesting of the district court's bankruptcy jurisdiction in bank-

ruptcy judges. In order to provide for the continuing operation of the bankruptcy system, the United States District Court for the Western District of Wisconsin adopted the interim bankruptcy rule on December 24, 1982.[8] Under the interim rule, all cases arising under the Bankruptcy Code and all civil proceedings arising in or related to such cases are automatically referred to the bankruptcy courts. In traditional bankruptcy cases, the bankruptcy court may issue orders and judgments that are effective on entry. In "related proceedings," only the district court may enter a final order unless the parties consent to entry by the bankruptcy court.

The interim rule defines related proceedings as

> those civil proceedings that, in the absence of a petition in bankruptcy, could have been brought in a district court or a state court. Related proceedings include, but are not limited to, claims brought by the estate against parties who have not filed claims against the estate. . . . A proceeding is not a related proceeding merely because the outcome will be affected by state law.

Interim Rule ¶ (d)(3)(A). Whether or not an action is a related proceeding within the meaning of the interim rule depends on whether the right sued on arises under the federal bankruptcy law. *See Salomon* v. *Kaiser*, 722 F.2d 1574, 1581-82 (2d Cir. 1983). In *Salomon*, the bankruptcy judge had imposed a constructive trust on real estate that the debtor had fraudulently transferred. On appeal, the debtor argued that an action to impose a constructive trust was a related proceeding, and thus the bankruptcy judge could not enter final judgment. The court of appeals acknowledged that an action to impose a construc-

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[8] The history of the interim rule is described in *White Motor Corp.* v. *Citibank, N.A.*, 704 F.2d 254, 259-62 (6th Cir. 1983).

tive trust could be brought in state court. The court, however, stated that

> [t]his action is inextricably tied to the creation of the estate in bankruptcy for the benefit of [the debtor's] creditors; there would be no cause of action without the federal bankruptcy statutes that authorize it. In other words, federal law provides that *right* upon which the remedy of the constructive trust sought here is based. . . .
>
> The present action . . . has no life of its own in either state or federal common law or statute independent of the federal bankruptcy laws.

Id. (emphasis in original). Thus, the case was not a related proceeding.

Similarly, a debtor has no right to assume an executory contract except under federal bankruptcy law. An action to assume a contract could not, in the absence of a petition in bankruptcy, be brought in state court or district court. The outcome of the action to assume may be affected by state law, but the interim rule provides that that is not determinative. Thus, debtors' action here to assume the dealership and jobbership contracts is not a related proceeding. *See also Seacoast Products, Inc.* v. *Spring Valley Farms, Inc.*, 34 B.R. 379, 380 (M.D.N.C. 1983).

The question of entitlement to injunctive relief under the PMPA, on the other hand, does not arise under the federal bankruptcy law. It is purely a statutory right arising under the PMPA. The debtors could have brought this cause of action in federal district court even if they had not filed a bankruptcy petition. The fact that Amoco is also a creditor of the estate is not determinative, because the rule expressly states that related proceedings are not

limited to claims against noncreditors.[9] Thus, debtors' cause of action under the PMPA is a related proceeding within the meaning of the interim rule.

We note that debtors have not raised any constitutional challenge, either to the validity of the interim rule itself or to the propriety of the bankruptcy court entering judgment on its claims. Thus, our holding on this point is purely an interpretation of the interim rule and not a matter of constitutional law. In *Northern Pipeline*, the Supreme Court held only that state common law causes of action cannot constitutionally be decided by a bankruptcy court. The Court did not reach the issue of whether the Constitution allows a bankruptcy court to adjudicate a cause of action arising solely under nonbankruptcy federal statutory law. *See Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. at 89-92 (Rehnquist, J., concurring). We also do not reach this issue.

B. District Court's Standard of Review

Debtors argue that, under the interim rule, the district court had to review the proceedings in the bankruptcy court *de novo*. Debtors appear to argue that, under the rule, they are entitled to a trial *de novo* of their related proceeding. They argue that the district court failed to perform its function because the district court's opinion discussed only two of the issues raised by debtors; on the other issues the district court adopted the bankruptcy court's findings and conclusions.

Amoco argues that a trial *de novo* is not required by the rule. The district court fulfilled its function of any *de*

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[9] Any indications that related proceedings are limited to actions by or against noncreditors contained in *White Motor Corp.* v. *Citibank N.A.*, 704 F.2d 254 (6th Cir. 1983), and *Salomon* v. *Kaiser*, 722 F.2d 1574, 1582 (2d Cir. 1983), are purely dicta.

novo review that the rule requires. The court reviewed the record and took additional evidence. The court stated that it did not give deference to the findings and conclusions of the bankruptcy court. Amoco argues that a district court need not expressly address every issue raised. Thus, Amoco contends, there was no violation of the interim rule.

The interim rule establishes a system for district court review of bankruptcy court proceedings. In nonrelated proceedings, the interim rule provides that the district court shall review orders entered by the bankruptcy court if a notice of appeal is filed. In related proceedings, the bankruptcy judge "shall submit findings, conclusions and a proposed judgment or order to the district judge." Interim Rule ¶ (d)(3)(B). The district court must review these regardless of whether a notice of appeal is filed. *Id.* at ¶ (e)(2)(A)(iii). The interim rule also provides:

> In conducting review [in both related and nonrelated proceedings], the district judge may hold a hearing and may receive such evidence as appropriate and may accept, reject, or modify, in whole or in part, the order or judgment of the bankruptcy judge and need give no deference to the findings of the bankruptcy judge.

Id. at ¶ (e)(2)(B). Thus, the interim rule clearly provides that the bankruptcy court will provide the district court with findings and conclusions. By providing that the district court may accept, reject, or modify the proposed order, the rule clearly contemplates that the court may adopt all or part of the order. The rule also makes the holding of a hearing and the taking of additional evidence discretionary with the district court. Thus, the interim rule does not require the district court to conduct a trial *de novo* or to issue a completely separate opinion.

The issue of whether this case is a related proceeding was not raised before the bankruptcy court. The bankruptcy court issued a memorandum decision rather than proposed findings and conclusions. We do not regard this difference as critical, and we shall treat the decision as though it were proposed findings and conclusions.

Although this is a close case, we find that the district court fulfilled the requirements of the interim rule here. *De novo* review requires the district court to make an independent judgment of the issues. *Cf. English* v. *Local Union No. 46*, 654 F.2d 473, 478 (7th Cir. 1981) (review of magistrate's recommendation). The district court conducted two hearings. It invited the parties to submit affidavits. The court stated in its opinion that it examined the entire record before the bankruptcy court and gave no deference to the bankruptcy court's findings and conclusions. The court did all that the rule requires.

Debtors' argument that the district court could not adopt the bankruptcy court's opinion misconstrues the nature of *de novo* review. It is not the form of the district court's opinion that is critical but rather the process that the court uses in reviewing the bankruptcy court's opinion. It is preferable for a district court to write separately to express its views on complex and novel issues such as those presented here. But while a district court may not merely rubber stamp a bankruptcy court opinion, it may adopt the opinion where, as here, the court has examined the record without giving deference to the bankruptcy court's findings and conclusions.

Debtors have stated that they are not raising any constitutional objections to the proceedings below. Instead, their claim is that the district court did not fulfill its duty under the interim rule. Thus, we do not reach the issue of whether the Constitution requires more than what the

district court did here; our decision is limited solely to the scope of the interim rule.

III. The Bankruptcy Code

Debtors raise six different arguments as to why they can assume the contracts. We shall address them separately.

A.

Debtors' first argument is related to the procedural requirements for termination of the contracts. They argue that they may assume the dealership contracts because the contracts were not properly terminated according to the contractual terms. Debtors contend that the contracts require that written notice of dishonored checks and five days to cure be given before a notice of termination is sent. Debtors maintain that the only cure notice received as to Oakdale was mailed the same day as the termination notice, February 2. As to Mauston, debtors argue that the cure notice, dated January 27, was insufficient because: it did not specify to which franchise the checks pertained; the return receipt address contained the word "jobber"; and the cure notice was not mailed to the address specified in the lease. The termination notice as to Mauston was also insufficient because it was mailed to the wrong address. Furthermore, debtors argue that strict compliance with the notice requirements of the PMPA is essential to lawful termination. The notices here did not comply with the PMPA. Thus, debtors argue, the contracts were never terminated.

Amoco, on the other hand, argues that the dealership termination notices complied with both the contracts and the PMPA. Amoco maintains that debtors have conceded that the cure notices were proper and that in any event defects in a cure notice have nothing to do with whether

termination notices are proper. As to Oakdale, the termination notices stated that, beyond the checks identified by number, "additional N.S.F. checks have been received and at this time constituted further contract violations." The notice also stated that the termination was "per Paragraph 15h" of the lease, which gives Amoco the right to terminate due to "reasonably convincing evidence of financial distress" of a franchisee. Amoco argues that the checks listed in the January 27 cure notice, regardless of the franchise to which they pertain, constitute "reasonably convincing evidence" of debtors' financial distress. As to Mauston, Amoco argues that nothing in the PMPA requires that a termination notice specify the franchise to which a dishonored check relates or that the notice be mailed to a particular address.

We turn first to the question of whether the termination procedure complied with the PMPA. The notice provisions of the PMPA are contained in section 2804, which provides in pertinent part:

> (c) Notification under this section—
>
> (1) shall be in writing;
>
> (2) shall be posted by certified mail . . .;
>
> (3) shall contain—
>
> (A) a statement of intention to terminate the franchise or not to renew the franchise relationship, together with the reasons therefor;
>
> (B) the date on which such termination or non-renewal takes effect; and
>
> (C) the summary statement [of remedies and relief available].

A franchisor must comply strictly with the notice requirements of the PMPA. *Escobar* v. *Mobil Oil Co.*, 678 F.2d 389, 390 n.2 (2d Cir. 1982); *Thompson* v. *Kerr-McGee Refining Corp.*, 660 F.2d 1380, 1390 (10th Cir. 1980), *cert. denied*, 455 U.S. 1019 (1982). Here, there is no dispute that the termination notices were in writing, sent by certified mail, and contained the reason for the termination, the date of termination, and the summary statement. There is no requirement that notices be sent to a particular address. Where, as here, there is no dispute that the different address resulted in no actual delay in receipt by the franchisee, there is no violation of the PMPA notice requirements on that account.

Debtors' argument seems to be that the reasons stated in the notice were insufficient under the PMPA, and thus the notices themselves were insufficient. This court has previously rejected a similar argument. *Brach* v. *Amoco Oil Co.*, 677 F.2d 1213, 1226 (7th Cir. 1982). In *Brach*, the franchisee argued that if the reason given for nonrenewal was insufficient under the PMPA, the notice failed to give a reason and thus was insufficient under the PMPA. The court ruled that this confused the grounds for nonrenewal with the reasons for nonrenewal. The court held that "the PMPA requires only that the franchisor articulate with sufficient particularity the basis for the decision not to renew so that the franchisee can determine his rights under the Act." *Id.* The court found the reasons given in that case sufficient to apprise the franchisee of his rights. Here, the reason given for termination pointed to a specific paragraph in the parties' agreement. Debtors have not contended that they were unable to determine the reason given or that they did not understand their rights under the PMPA. Thus, the reason given in the termination notices was sufficient to meet the procedural notice requirements of the PMPA.

We turn next to the issue of whether the termination notices complied with the procedural requirements of the contracts. As to Mauston, the lease does provide that the notices shall be sent to "105 Murphy Drive" rather than to "Hwy. 82 & I-90/94," where the notices actually were sent. The purpose of such a provision is to ensure that the franchisee receives timely notice. Where, as here, there is no dispute that the difference in address caused no delay in receipt, the discrepancy is harmless. Further, as to Mauston, the contract does not require that a cure notice must specify to which franchise a dishonored check applies. There is no dispute that two of the checks on the January 27 cure notice related to the Mauston dealership. Thus, debtors had sufficient notice under the franchise contracts. As to Oakdale, debtors' failure to cure the checks listed in the January 27 cure notice was evidence of their financial distress, regardless of the franchise to which the checks pertained. According to the contract provision, it is not the failure to cure the dishonored checks within five days that is the grounds for termination; the failure to cure is evidence of financial distress. Thus, the contracts were properly terminated by their own terms.

B.

Debtors' second argument relates to the timeliness of the notice of termination of the contracts. Debtors argue that the termination notices were effective only on receipt. Because debtors did not receive the notices until February 4, the day that they filed for bankruptcy, the contracts were not terminated pre-bankruptcy and may be assumed. Debtors argue that under Wisconsin law notice served by mail is not effective until receipt, unless the rule is varied by an unambiguous agreement between the parties. The contract here provides that "[t]he postmark date shall be the date of any notice sent by certified mail." Certified

mail results in at least two postmarks—one showing the date of mailing and one showing the date of receipt. Thus, according to debtors, the contract is ambiguous and does not vary the rule that notice by mail is effective only on receipt. Amoco, in turn, argues that the word "postmark" is unambiguous and thus does change the usual rule.

We find debtors' argument to be without merit. If we accept the argument, the contract provision would be superfluous. Had the parties intended the date of receipt to control—the usual rule—they need not have included the provision. We must interpret a contract so as to give effect to each provision. *American Motorists Insurance Co.* v. *Trane Co.*, 544 F. Supp. 669, 678 (W.D. Wis. 1982), *aff'd*, 718 F.2d 824 (7th Cir. 1983); *Stanhope* v. *Brown County*, 90 Wis. 2d 823, 280 N.W.2d 711 (1979). Furthermore, we note that Wisconsin law recognizes that where service of process by certified mail is authorized by statute, service is deemed complete upon mailing. *Schroedel Corp.* v. *State Highway Commission*, 38 Wis. 2d 424, 157 N.W.2d 562 (1968).

Thus, the termination notices were effective when they were mailed, before the debtors filed for bankruptcy.

C.

Debtors' third argument relates to the timeliness of effectiveness of termination of the dealership contracts. They argue that the terminations were not effective for ninety days from the date of notice, and they filed under chapter 11 before the ninety-day period expired. Thus, according to debtors, the contracts were still executory when they filed and could be assumed under section 365.

Amoco argues that the ninety-day waiting period before the effective date of the termination does not give debtors the right to assume the contracts. After the termination

notices were sent, all that remained under the contracts was the passage of time until the terminations were complete. Amoco argues that when debtors filed, there was nothing left to assume under the contract except the remaining time—ninety days—before the contract was terminated completely.

Section 365 of the Code only gives a debtor the right to assume an executory contract. If a contract has been terminated pre-bankruptcy, there is nothing left for the debtor to assume. However, the termination must be complete and not subject to reversal, either under the terms of the contract or under state law. L. King, 2 Collier on Bankruptcy ¶ 365.03 (15th ed. 1979); *see In re Fountainbleu Hotel Corp.*, 515 F.2d 913 (5th Cir. 1975).

As discussed above, here the dealership termination notices were effective prior to debtors' filing in bankruptcy. The contract gave debtors no right to cure once the termination notices were mailed. Amoco did not have to take any further action to terminate the contracts; termination was automatic at the end of ninety days. Wisconsin law also gives debtors no right to cure.[10]

The fact that the termination itself was not effective for ninety days does not affect the result. The filing of the chapter 11 petition cannot expand debtors' rights as against Amoco. *Schokbeton Industries, Inc.* v. *Schokbeton Products Corp.*, 466 F.2d 171, 176-77 (5th Cir. 1972); *see Kopelman* v. *Halvajian (In re Triangle Laboratories, Inc.)*, 663 F.2d 463, 467-68 (3d Cir. 1981). When the termination notice was sent, debtors only had a right to ninety

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[10] Any right to cure to prevent termination provided by the Wisconsin Fair Dealership Law, Wis. Stat. § 135.04 (1974 & Supp. 1983) has been preempted by the PMPA *See* 15 U.S.C. § 2806 (1982).

days' worth of dealership contracts. The filing of the petition does not expand that right. This conclusion is supported by a number of decisions in the bankruptcy courts. *See, e.g., New Media Irjax* v. *D.C. Comics,* 19 B.R. 199 (Bankr. M.D. Fla. 1982); *In re Benrus Watch Co.,* 13 B.R. 331 (Bankr. S.D.N.Y. 1981); *In re Beck,* 5 B.R. 169 (Bankr. D. Haw. 1980).

Similarly, section 541(a) provides that a debtor's estate consists of "all legal or equitable interests of the debtor in property as of the commencement of a case." Thus, whatever rights a debtor has in property at the commencement of the case continue in bankruptcy—no more, no less. Section 541 "is not intended to expand the debtor's rights against others more than they exist at the commencement of the case." H.R. Rep. No. 595, 95th Cong., 1st Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787.

Section 362, which creates an automatic stay of certain creditor actions upon the filing of a petition in the bankruptcy court, does not help debtors here. The automatic stay does not toll the mere running of time under a contract, and thus it does not prevent automatic termination of the contract. *See Johnson* v. *First National Bank of Montevideo,* 719 F.2d 270, 273 (8th Cir. 1983), *cert. denied,* 104 S. Ct. 1015 (1984). *See also, e.g., In re Anne Cara Oil Co.,* 32 B.R. 643, 647-48 (Bankr. D. Mass. 1983); *In re Nashville White Trucks,* 5 B.R. 112, 117 (Bankr. M.D. Tenn. 1980). Section 362 does not give a debtor greater rights in a contract. *Trigg* v. *United States,* 630 F.2d 1370, 1372 (10th Cir. 1980). Thus, debtors cannot rely on section 362 to prevent termination of the contracts.

D.

Debtors argue that the Mauston dealership is assumable because of the standstill agreement that the parties en-

tered into on January 28. Debtors allege that pursuant to this agreement their counsel told them that it was not necessary to cure the checks. Debtors contend that this agreement tolled the running of the five-day cure period, and therefore, the termination notices were issued prematurely and were not effective. Debtors also argue that by entering into the standstill agreement, Amoco induced them not to cure the dishonored checks. Debtors argue that they delayed filing their bankruptcy petitions after settlement negotiations failed because Amoco induced them to believe that they had several days left to cure. Thus, Amoco is equitably estopped to terminate the dealership.

Amoco responds that the standstill agreement between the parties pertained only to whether Amoco would immediately pump its tanks dry. The parties agreed that Amoco would continue to supply debtors with petroleum products pending settlement negotiations. Amoco states that it never represented to debtors that they need not cure the checks. Thus, Amoco argues, there is no basis either to find the cure period tolled or to find Amoco equitably estopped to terminate the dealership.

The district court found that Amoco had never explicitly or implicitly agreed to any standstill of the cure period, only to a standstill of pumping its tanks. The court found nothing to indicate that Amoco had done anything to induce debtors not to cure the checks. The court found that debtors had delayed filing bankruptcy petitions because Amoco agreed to consider a settlement offer. However, because debtors had over a day to file between the time that Amoco rejected the offer and the time that the termination notices were mailed, the court found no basis for equitable estoppel.

The district court's finding that the standstill agreement related only to pumping the tanks dry and not to the cure period is a finding of fact that we cannot reverse unless it is clearly erroneous. Fed. R. Civ. P. 52(a). On the record before us, we cannot disagree with the district court, particularly where, as here, the finding is based in part on the credibility of the witnesses. Moreover, debtor Moody testified that debtors could not have cured the checks during the time period in question because their financial affairs were in disarray. District Court Transcript at 65-67. Thus, a standstill would have had no practical effect on debtors' ability to cure the checks. Debtors' counsel[11] may have advised them that it was unnecessary to cure the checks, but absent some evidence that Amoco agreed to this, the cure period was not tolled.

The question of estoppel is a closer one. Equitable estoppel does not depend on an agreement between the parties. Under Wisconsin law,

> [t]he defense of equitable estoppel consists of action or non-action which, on the part of one against whom estoppel is asserted, induces reliance thereon by the other, either in action or non-action, which is to his detriment. . . . It is elementary, however, that the reliance on the words or conduct of the other must be reasonable . . . and justifiable . . . .

Kohlenberg v. *American Plumbing Supply Co.*, 82 Wis. 2d 384, 396, 263 N.W.2d 496, 501 (1978) (citations omitted). Here, we agree with the district court that Amoco did nothing to induce reasonable reliance by debtors on a tolling of the cure period. Debtors may have relied

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[11] Debtors' counsel on appeal to this court did not represent them during the settlement negotiations with Amoco. Appellate counsel entered the case while it was pending before the district court, when the original counsel had to withdraw because of a conflict of interest.

on their counsel's advice, but that is no basis on which to estop Amoco.[12]

E.

Debtors argue that even if the dealerships were terminated before they filed for bankruptcy, they can assume the contracts because the power to cure defaults under section 365 includes the power to revive an executory contract terminated pre-bankruptcy. Debtors cite *DiPierro* v. *Taddeo,* 685 F.2d 24 (2d Cir. 1982), for the proposition that a debtor may cure and revive a contract.

Taddeo, however, is distinguishable. In *Taddeo,* debtors had defaulted on their mortgage payments. The mortgage holder accelerated the mortgage and instituted foreclosure proceedings. Before the holder could obtain a final judgment of foreclosure and sale, debtors filed a petition for relief under chapter 13. Under applicable state law, debtors could have avoided foreclosure by paying off the full amount of the mortgage. Thus, the contract had not been fully terminated pre-bankruptcy, in contrast to the situation in this case. *See In re Clark,* 32 B.R. 711 (W.D. Wis. 1983).

Where a contract has been validly terminated pre-bankruptcy, the debtors' rights to continued performance under the contract have expired. The filing of a petition under chapter 11 cannot resuscitate those rights. *See In re Triangle Laboratories, Inc.,* 663 F.2d at 467-68. Here, the dealership contracts were terminated and cannot be revived.

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[12] *In re Bronx-Westchester Mack Corp.,* 4 B.R. 730 (Bankr. S.D.N.Y. 1980), relied on by debtors, is inapposite. In that case, the creditor expressly promised not to terminate a contract if the debtor did not file under chapter 11. The debtor did not file, and the creditor sent a notice of termination. The court held that the creditor was estopped to terminate the contract. In contrast, in this case Amoco made no promises, express or implied.

F.

Debtors argue that the jobbership contract is assumable because they filed for bankruptcy before the expiration of the fifteen-day cure period allowed by the jobbership termination notice. Thus, according to debtors, the contract was executory at the time of filing. Under section 365(d)(1), debtors may assume an executory agreement at any time before confirmation of the plan. Debtors contend that therefore the jobbership is still assumable.

Amoco argues that under section 108(b) of the Code, debtors had only sixty days from the date of filing to cure the default. Because debtors failed to cure within the sixty days, Amoco argues that debtors may no longer assume the contract.

The bankruptcy court held that section 108(b) controlled and thus, debtors would have had to cure the default within sixty days if they wanted to assume the contract. The district court did not separately address the issue.

Section 365[13] provides that the debtor may assume or reject an executory contract at any time before confir-

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[13] Section 365 provides in pertinent part:

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default; . . .

(d)(2) In a case under chapter 9, 11, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of the debtor at any time before the confirmation of a plan, but the court, on request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

Although § 365 refers to a "trustee," in a chapter 11 reorganization proceeding a debtor-in-possession has the rights and powers and performs the functions of a trustee. 11 U.S.C. § 1107(a) (1982).

mation of the plan. 11 U.S.C. § 365(d)(2). If there has been a default under the contract, the debtor must cure the default at the time of the assumption. 11 U.S.C. § 365(b)(1)(A). This court has summarized the policy behind section 365 as follows:

> Since a debtor is in limbo until confirmation of a plan, it is understandably difficult to commit itself to assuming or rejecting a contract much before the time for confirmation of a plan. . . . This procedure insures that the debtor is not in the precarious position of having assumed a contract relying on confirmation of a particular plan, only to find the plan to have been rejected.

Data-Link Systems, Inc. v. *Whitcomb & Keller Mortgage Co.*, 715 F.2d 375, 378 (7th Cir. 1983) (quoting unpublished bankruptcy order of April 8, 1981).

Section 108(b)[14] provides in part that where an agreement fixes a time period in which the debtor may cure a default, the debtor may cure before the later of the expiration of the time period or sixty days after the filing of the petition. We hold, however, that section 108(b) does not apply to curing defaults in executory contracts. Section 365 specifically governs the time for curing defaults in executory contracts, and thus, it controls here. *See In re McLouth Steel Corp.*, 20 B.R. 688 (Bankr. E.D. Mich.

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[14] Section 108(b) provides in pertinent part:

> [I]f applicable law, or an order entered in a proceeding, or an agreement fixes a period within which the debtor . . . may file any pleadings, demand, notice, or proof of claim or loss, cure a default, or perform any other similar act, and such period has not expired before the date of the filing of the petition, the trustee may only file, cure, or perform, as the case may be, before the later of—
>
> (1) the end of such period . . . ; and
>
> (2) 60 days after the order for relief.

1982).[15] At the time debtors filed their petition, the time for cure had not expired. The contract was still executory. *See In re Easthampton Sand & Gravel Co.*, 25 B.R. 193, 197 (Bankr. E.D.N.Y. 1982). Under section 365(a), debtors may still elect to assume the contract. If debtors ultimately determine to assume it, they may cure the default at any time prior to the assumption, pursuant to section 365(b)(1)(A).

This holding is consistent with the policies underlying the different provisions and the Code in general. The purpose behind section 108(b) is to permit the debtor an extension of time for doing certain acts necessary to preserve his rights. It would be anomalous to apply it to restrict debtors' rights, as Amoco would have us do here. Applying section 108(b) here would force debtors to decide whether to cure long before they must decide whether to assume or reject the contract and long before they know whether any reorganization plan will be con-

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[15] The bankruptcy court relied on *In re Santa Fe Development and Mortgage Corp.*, 16 B.R. 165 (Bankr. 9th Cir. 1981), for the proposition that § 108(b) applied in this case. *Santa Fe*, however, applied § 108(b) to permit the debtor to make a payment to extend an escrow. The analysis did not deal with curing a default under an executory contract.

In *Johnson* v. *First National Bank of Montevideo*, 719 F.2d 270 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 1015 (1984), the court held that § 108(b) rather than § 362 controlled the time of expiration of a statutory period of redemption of a mortgage. *Johnson* is distinguishable. Section 362 does not explicitly provide a time limit for statutory periods of redemption, and thus there is no express conflict between § 362 and § 108(b). In contrast, § 365 expressly provides a time limit for cure of defaults under executory contracts. We should not apply § 108(b) so as to cause an irreconcilable conflict between the two sections. *Id.* at 278 (*citing Bank of Commonwealth* v. *Bevan*, 13 B.R. 989 (E.D. Mich. 1981). We express no opinion as to whether the decision in *Johnson* is correct.

firmed. Finally, the purpose behind chapter 11 is "to permit successful rehabilitation of debtors" and "to prevent a debtor from going into liquidation." *NLRB* v. *Bildisco & Bildisco,* 104 S. Ct. 1188, 1197 (1984). Debtors must be permitted a certain amount of flexibility in determining whether to assume or to reject a contract. Specific provisions of the Code should be interpreted with this goal in mind. To interpret the Code so as to minimize flexibility and rush the debtor into what may be an improvident decision does not further the purposes of the reorganization provisions.

We emphasize that this holding does not leave the other party to the contract without remedy until the time for confirmation of the plan. A party who cannot afford the uncertainty during the pendency of the reorganization may request the bankruptcy court to order the debtor to decide whether to assume or reject the contract within a specified period. 11 U.S.C. § 365(d)(2).

IV. The PMPA

Debtors argue that they are entitled to a preliminary injunction under the PMPA prohibiting Amoco from terminating the contracts pending a trial on the merits of their claim. Debtors argue that the terminations were for technical or unimportant reasons and for a cause beyond their reasonable control, in violation of the PMPA. Thus, debtors contend, they have raised a serious question as to the merits of their claim, which is the standard required by the PMPA for the granting of preliminary relief.

Amoco argues that debtors' failure to cure the dishonored checks was not technical or unimportant and was not beyond debtors' reasonable control. Amoco maintains that therefore debtors have not met the standard required by the PMPA for a preliminary injunction.

Section 2805(b)(1) of the PMPA provides that the court "shall" grant a preliminary injunction where "there exists sufficiently serious questions going to the merits to make such questions fair ground for litigation" and the balance of hardships favors the franchisee. Section 2802(b)(2)(c) permits a franchisor to terminate a franchise for "the occurrence of an event which is relevant to the franchise relationship and as a result of which termination . . . is reasonable . . . ." This power is limited by section 2801(1)(B)(13), which provides that a failure under the PMPA does not include one that "is only technical or unimportant to the franchise relationship" or is "beyond the reasonable control of the franchisee."

The franchisee's burden of proof for receiving a preliminary injunction under the PMPA is not a heavy one. In contrast to rule 65 of the Federal Rules of Civil Procedure, which requires a movant to show a strong or reasonable likelihood of success, the PMPA requires only that a franchisee show a reasonable chance of success on the merits. *See Wojciechowski* v. *Amoco Oil Co.*, 483 F. Supp. 109, 114 (E.D. Wis. 1980); *Saad* v. *Shell Oil Co.*, 460 F. Supp. 114, 117 (E.D. Mich. 1978).

Our review of the district court's refusal to grant a preliminary injunction is a narrow one. This court will not reverse a district court's grant or denial of a preliminary injunction absent a clear abuse of discretion by the district court. *See Martin* v. *Helstad*, 699 F.2d 387, 389 (7th Cir. 1983). Thus, this court must decide whether the district court abused its discretion in determining that there was not a serious question as to whether the terminations were lawful under the PMPA.

Section 2802(c) provides examples of relevant events for which termination is reasonable. It includes "failure

by the franchisee to pay to the franchisor in a timely manner when due all sums to which the franchisor is legally entitled." Financial distress, the reason given by Amoco for the terminations here, is not listed. Congress, however, did not intend the list to be exclusive; other events may serve as grounds for termination. S. Rep. No. 731, 95th Cong. 2d Sess. 38, *reprinted in* 1978 U.S. Code Cong. & Ad. News 893, 896. Courts must carefully scrutinize grounds that are not listed to make certain that the statutory standard of relevance and reasonableness has been met. *Id.*

In determining whether the ground relied on for termination is proper under section 2802(b)(2)(c), we must look to the purposes of the PMPA. *Brach* v. *Amoco Oil Co.*, 677 F.2d 1213 (7th Cir. 1982). In *Brach,* this court found that Congress, in enacting the PMPA, sought to protect franchisees from arbitrary terminations and nonrenewals while allowing franchisors to exercise reasonable business judgment. Section 2802(b)(2)(c) helps maintain that balance by allowing termination for unforeseen yet reasonable grounds. *Id.* at 1230. This court held that the section must be given a narrow construction "consistent with its overriding purpose to protect franchisees." *Id.* at 1221. "Events in the nature of contract violations must be assessed by an independent analysis of reasonableness and materiality." *Id.* This test is equivalent to the statutory requirement that termination cannot be for a failure that is for technical or unimportant reasons or for reasons beyond the franchisee's control.

Financial distress is certainly relevant to the franchise relationship. The PMPA is designed to protect franchisees against arbitrary terminations. A termination for financial distress is not arbitrary. A contractual provision is

reasonable if it "has a basis in common sense and experience and is not unconscionable." *Brach* v. *Amoco Oil,* 677 F.2d at 1223 (citations omitted). The fact that the PMPA permits termination for failure to make timely payment recognizes that the franchisee's duty and ability to pay are central to the franchise relationship.

Debtors argue that their failure to cure the dishonored checks was technical and unimportant because the checks were for a small amount compared to the total amount of their business. This ignores the fact that debtors had owed Amoco a large sum on the jobbership for some time. Under the facts of this case, Amoco's decision to terminate the contracts was an exercise of its business judgment. We cannot substitute our business judgment for that of the franchisor. *Brach* v. *Amoco Oil,* 677 F.2d at 1223. Debtors' giving of a number of dishonored checks, coupled with the substantial arrearages under the jobbership contract, is not technical or unimportant.

Similarly, the failure to cure the checks was not beyond debtors' reasonable control. We have already determined that debtors had no reasonable basis to believe that their duty to cure within five days had been tolled. Moreover, the district court found that debtors had the ability to cure the checks within the five-day period. Debtors have not demonstrated that this finding of fact is clearly erroneous.

Because debtors have not shown the existence of a serious question on the merits of their claim, we need not discuss whether the balancing of hardships would favor debtors. Debtors have not shown an abuse of discretion in the denial of a preliminary injunction.

V.

In summary, we reverse the district court's holding that the PMPA claims are not a related proceeding. The district court must enter final judgment on those claims. We also reverse the holding that debtors may not assume the jobbership contract. We affirm the remainder of the district court's opinion, and we remand this case for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

EVANS, *District Judge,* dissenting.

Although Judge Flaum's opinion is meticulous and his reasoning persuasive, the subject matter of this appeal, things like the assumability of certain jobbership contracts under the Petroleum Marketing Practices Act, is rather dry. Accordingly, rather than further burden the weary reader with a long dissent, I simply note, without expansion, that I believe that the district court was correct when it held that the debtors could not assume the jobbership contract. In addition, I believe that under the facts of this case the seeking of injunctive relief under PMPA is so inextricably tied to the creation of the estate in bankruptcy that it compels the conclusion that it is not a related proceeding within the meaning of the interim rule. Thus, I would affirm all aspects of the proceedings conducted below.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

AMOCO'S DEALERSHIP LEASE AGREEMENT

(Excerpted Portion Of Amoco's Standard 30-Paragraph Lease; The Mauston And Oakdale Dealership Leases Are Identical)

15. Lessor shall have the right to terminate or non-renew this lease, and any applicable franchise relationship under the Petroleum Marketing Practices Act or other applicable federal, state or local act of a similar nature, if any of the following events shall occur:

    (a) Breach of any provision of this lease by Lessee.

    (b) Abandonment of the Premises by Lessee or failure by Lessee to operate the Premises for normal sales of gasoline during normal business hours for seven (7) consecutive days or such lesser period which under the facts and circumstances constitutes an unreasonable period of time.

    (c) Conviction of Lessee of any felony involving moral turpitude.

    (d) Commission by Lessee or any of Lessee's employees or agents of any deceptive, fraudulent, illegal, immoral, or other improper act relative to the business on the Premises which is detrimental to Lessor or to any member of the public, including, without limitation: (1) participation in any fraudulent or improper use of any credit card or motor club membership card issued or honored by Lessor with the purpose or effect of defrauding Lessor or the authorized holder of such card; (2) tampering with pump meters, misrepresentation in pump meter readings and/or the reporting thereof, and the like; and (3) violation of any

consumer protection law or regulation. Purchase by Lessee, without Lessor's consent, of credit card delivery tickets from other dealers covering sales of Lessor's products shall be deemed fraudulent for purposes hereof.

(e) Failure by Lessee to pay to Lessor in a timely manner when due all sums to which Lessor is legally entitled.

(f) Failure of Lessee, in good faith, to devote his personal attention upon the Premises to managing the business activities of the gasoline sales facility referred to in Paragraph 12, without first securing a written consent from Lessor.

(g) Death or other continuing severe physical or mental disability of Lessee of at least three months' duration (or such shorter duration which under the facts and circumstances constitutes an unreasonable period of time) which renders Lessee unable to provide for the continued proper operation of the gasoline sales facility activities referred to in Paragraph 12.

(h) Declaration of bankruptcy by Lessee, judicial determination that Lessee is bankrupt or insolvent or any other reasonably convincing evidence of financial distress of Lessee, such as, without limitation, appointment of a receiver for Lessee, assignment by Lessee for the benefit of creditors, giving of one or more Non Sufficient Fund checks which remain dishonored after five days from the postmark date (or, in the case of hand delivery, date of personal delivery) of notice from Lessor to cure the dishonor, and the like.

(i) Removal of, or significant reduction in, Lessee's assets located on the Premises to the prejudice of Lessor's right of distraint.

(j) Destruction of all or a substantial part of the Premises, it being understood that if the Premises are rendered untenantable, rent shall abate as of the date the Premises are rendered untenantable. In the event the Premises shall be subsequently rebuilt or replaced by Lessor and operated under a lessee franchise relationship, Lessor shall grant to Lessee a thirty (30) day right of first refusal of the new franchise, dating from the postmark date of notice by Lessor to Lessee that the Premises will be rebuilt for franchise operation.

(k) Failure of Lessee to exert good faith efforts to carry out the provisions of this lease and/or any applicable franchise relationship.

(l) Condemnation or other taking, in whole or in part, of the Premises pursuant to the power of eminent domain or to a conveyance in lieu thereof. Lessor shall be entitled to the full amount of any award for such taking which represents the value of the Premises, to the same extent as though this lease did not exist. However, the amount of any award for such taking which represents, as such, any loss of business opportunity or good will by Lessee shall be fairly apportioned by Lessor between the parties hereto.

16. (a) If Lessee shall fail to perform any of the covenants of this lease, or if any other ground for termination or non-renewal by Lessor shall occur, Lessor shall have the right, at Lessor's elec-

tion, to terminate or non-renew this lease and any applicable franchise relationship by giving notice as hereinafter provided. The notice shall be furnished to Lessee not less than ninety (90) days prior to the date on which the termination or non-renewal is to take effect, except that in circumstances where such length of notice would be unreasonable, the notice shall be furnished on the earliest date which is reasonably practicable.

(b) For purposes of the foregoing and any statute governing termination and non-renewal, all provisions hereof granting rights of termination and non-renewal to Lessor shall be construed as imposing upon Lessee an affirmative duty to take action to avoid the event which justifies Lessor's exercise of a right of termination or non-renewal, regardless of whether or not the provision is expressly stated in terms of such an affirmative duty.

(c) With respect to the first notice, only, of failure by Lessee to make a timely rent payment under Paragraph 3 hereof, said notice shall be rendered null and void if Lessee within fifteen (15) days after the postmark date of the notice shall cure the default by payment of the rent as specified in Paragraph 3.

(d) With respect to the first notice, only, of a default or multiple defaults by Lessee under any provision (or provisions) of this lease other than Paragraph 3 and other than any sub-paragraph listed in sub-paragraph 16(e) below, said notice shall be rendered null and void if Lessee within thirty (30) days after the postmark date of the

notice shall cure the default (or defaults). Where the notice period under sub-paragraph 16(a) above is less than ninety (90) days, the time within which to cure the default shall be one-half of the notice period, but never to exceed thirty (30) days.

(e) The aforesaid rights to nullify a notice shall not apply to sub-paragraphs 13(c) and 15(b), (c), (d), (g), (h), (j), and (l) hereof.

Standard Oil Division
Amoco Oil Company
Madison District
225 N. Sherman Avenue
Madison, Wisconsin 53704
608-249-7606

B. E. Stevens
District Manager

February 3, 1983

VIA CERTIFIED - RETURN RECEIPT REQUESTED

Mr. G. W. Moody
Hwy. 82 & I-90/94
Mauston, Wisconsin 53948

RE: SS #15398, Mauston, Wi.

Dear Mr. Moody:

Your checks, #20550 and #20552, dated January 19, 1983, payable to Amoco Oil Company, in the amounts of $7,919.16 and $3,062.89 respectively, have been returned by the bank for the reason that there are non-sufficient funds in your account to cover. As of this date, payment has not been received and therefore the five-day grace period has expired.

Beyond the checks stated above, additional N.S.F. checks have been received and at this time constitute further contract violations.

Please consider this our notice to cancel Dealer Lease #B-3836-5 (Form 26-342) dated May 3, 1982 per Paragraph 15h of said lease. Said cancellation is to become effective ninety-days from the date of this letter.

Enclosed is a Summary Statement of the Provisions of Title I of the Petroleum Marketing Practices Act as pub-

lished by the Secretary of Energy in conformity with the requirements of said Act.

Sincerely,

/s/ *B. E. Stevens*
B. E. Stevens
District Manager

BES:cn

Attachment

cc: R. L. Pettis, Field Sales Manager
D. W. Powell, Territory Manager #17

Standard Oil Division
Amoco Oil Company
225 N. Sherman Avenue
Madison, Wisconsin 53704
608-249-7606

B. E. Stevens
District Manager

February 3, 1983

VIA CERTIFIED - RETURN RECEIPT REQUESTED

Mr. G. W. Moody
I-90 & Hwy. PP
Oakdale, Wisconsin 54649

RE: SS #18674, Oakdale, Wi.

Dear Mr. Moody:

Your checks, #20549 and #20581, dated January 19, 1983 and January 21, 1983 respectively, payable to Amoco Oil Company, in the amount of $2,307.33 and $2,287.74 respectively, have been returned by the bank for the reason that there are non-sufficient funds in your account to cover. As of this date, payment has not been received and therefore the five-day grace period has expired.

Beyond the checks stated above, additional N.S.F. checks have been received and at this time constitute further contract violations.

Please consider this our notice to cancel Dealer Lease #B-4166-4 (Form 26-342) dated April 24, 1981 per Paragraph 15h of said lease. Said cancellation is to become effective ninety-days from the date of this letter.

Enclosed is a Summary Statement of the Provisions of Title I of the Petroleum Marketing Practices Act as pub-

lished by the Secretary of Energy in conformity with the requirements of said Act.

Sincerely,

/s/ B. E. Stevens
B. E. Stevens
District Manager

BES:cn

Attachment

cc: R. L. Pettis, Field Sales Manager
D. W. Powell, Territory Manager #17

SECTION 365 (11 U.S.C. § 365)

§ 365 Executory contracts and unexpired leases.

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

* * *

(d)(1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

(2) In a case under chapter 9, 11, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of the debtor at any time before the confirmation of a plan, but the court, on request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

(e)(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

SECTION 541 (11 U.S.C. § 541)

§ 541 Property of the estate.

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located:

(1) Except as provided in subsections (b) and (c) (2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

CHAPTER 55. PETROLEUM MARKETING PRACTICES

FRANCHISE PROTECTION

Section

2801. Definitions

2802. Franchise relationship

(a) General prohibition against termination or nonrenewal

(b) Precondition and grounds for termination or nonrenewal

(c) Definition

(d) Compensation, etc., for franchisee upon condemnation or destruction of marketing premises

2803. Trial and interim franchises

(a) Nonapplicability of statutory nonrenewal provisions

(b) Definitions

(c) Nonrenewal upon meeting statutory notification requirements

2804. Notification of termination or nonrenewal of franchise relationship

(a) General requirements applicable to franchisor

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2805. Enforcement provisions

(a) Maintenance of civil action by franchisee against franchisor; jurisdiction and venue: time for commencement of action

(b) Equitable relief by court; bond requirements; grounds for nonexercise of court's equitable powers

(c) Burden of proof; burden of going forward with evidence

(d) Actual and exemplary damages and attorney and expert witness fees to franchisee; determination by court of right to exemplary damages and amount, attorney and expert witness fees to franchisor for frivolous actions

(e) Discretionary power of court to compel continuation or renewal of franchise relationship; grounds for noncompulsion; right of franchisee to actual damages and attorney and expert witness fees unaffected

2806. Relationship of statutory provisions to State and local laws

FRANCHISE PROTECTION

§ 2801. Definitions

As used in this title:

(1)(A) The term "franchise" means any contract—

(i) between a refiner and a distributor.

(ii) between a refiner and a retailer.

(iii) between a distributor and another distributor, or

(iv) between a distributor and a retailer, under which a refiner or distributor (as the case may be) authorizes or permits a retailer or distributor to use, in connection with the sale, consignment, or distribution of motor fuel, a trademark which is owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such use.

(B) The term "franchise" includes—

(i) any contract under which a retailer or distributor (as the case may be) is authorized or permitted to occupy leased marketing premises, which premises are to be employed in connection with the sale, consignment, or distribution of motor fuel under a trademark which is owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such occupancy;

(ii) any contract pertaining to the supply of motor fuel which is to be sold, consigned or distributed—

(I) under a trademark owned or controlled by a refiner; or

(II) under a contract which has existed continuously since May 15, 1973, and pursuant to which, on

May 15, 1973, motor fuel was sold, consigned or distributed under a trademark owned or controlled on such date by a refiner; and

(iii) the unexpired portion of any franchise, as defined by the preceding provisions of this paragraph, which is transferred or assigned as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise.

(2) The term "franchise relationship" means the respective motor fuel marketing or distribution obligations and responsibilities of a franchisor and a franchisee which result from the marketing of motor fuel under a franchise.

(3) The term "franchisor" means a refiner or distributor (as the case may be) who authorizes or permits, under a franchise, a retailer or distributor to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

(4) The term "franchisee" means a retailer or distributor (as the case may be) who is authorized or permitted, under a franchise, to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

(5) The term "refiner" means any person engaged in the refining of crude oil to produce motor fuel, and includes any affiliate of such person.

(6) The term "distributor" means any person, including any affiliate of such person, who—

(A) purchases motor fuel for sale, consignment, or distribution to another; or

(B) receives motor fuel on consignment for consignment or distribution to his own motor fuel accounts

or to accounts of his supplier, but shall not include a person who is an employee of, or merely serves as a common carrier providing transportation service for, such supplier.

(7) The term "retailer" means any person who purchases motor fuel for sale to the general public for ultimate consumption.

(8) The term "marketing premises" means, in the case of any franchise, premises which, under such franchise, are to be employed by the franchisee in connection with the sale, consignment, or distribution of motor fuel.

(9) The term "leased marketing premises" means marketing premises owned, leased, or in any way controlled by a franchisor and which the franchisee is authorized or permitted, under the franchise, to employ in connection with the sale, consignment, or distribution of motor fuel.

(10) The term "contract" means any oral or written agreement. For supply purposes, delivery levels during the same month of the previous year shall be prima facie evidence of an agreement to deliver such levels.

(11) The term "trademark" means any trademark, trade name, service mark, or other identifying symbol or name.

(12) The term "motor fuel" means gasoline and diesel fuel of a type distributed for use as a fuel in self-propelled vehicles designed primarily for use on public streets, roads, and highways.

(13) The term "failure" does not include—

(A) any failure which is only technical or unimportant to the franchise relationship; or

(B) any failure for a cause beyond the reasonable control of the franchisee.

(14) The terms "fail to renew" and "nonrenewal" mean, with respect to any franchise relationship, a failure to reinstate, continue, or extend the franchise relationship—

(A) at the conclusion of the term, or on the expiration date, stated in the relevant franchise;

(B) at any time, in the case of the relevant franchise which does not state a term of duration or an expiration date; or

(C) following a termination (on or after the date of enactment of this Act [enacted June 19, 1978]) of the relevant franchise which was entered into prior to such date of enactment and has not been renewed after such date.

(15) The term "affiliate" means any person who (other than by means of a franchise) controls, is controlled by, or is under common control with, any other person.

§ 2802. Franchise relationship

(a) General prohibition against termination or nonrenewal. Except as provided in subsection (b) and section 103 [15 USCS § 2803(b)], no franchisor engaged in the sale, consignment, or distribution of motor fuel in commerce may—

(1) terminate any franchise (entered into or renewed on or after the date of enactment of this Act [enacted June 19, 1978]) prior to the conclusion of the term, or the expiration date, stated in the franchise; or

(2) fail to renew any franchise relationship (without regard to the date on which the relevant franchise was entered into or renewed).

(b) Precondition and grounds for termination or nonrenewal. (1) Any franchisor may terminate any fran-

chise (entered into or renewed on or after the date of enactment of this Act [enacted June 19, 1978]) or may fail to renew any franchise relationship, if—

(A) the notification requirements of section 104 [15 USCS § 2804] are met; and

(B) such termination is based upon a ground described in paragraph (2) or such nonrenewal is based upon a ground described in paragraph (2) or (3).

(2) For purposes of this subsection, the following are grounds for termination of a franchise or nonrenewal of a franchise relationship:

(A) A failure by the franchisee to comply with any provision of the franchise, which provision is both reasonable and of material significance to the franchise relationship, if the franchisor first acquired actual or constructive knowledge of such failure—

(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 104(a) [15 USCS § 2804(a)]; or

(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 104(b)(1) [15 USCS § 2804(b)(1)].

(B) A failure by the franchisee to exert good faith efforts to carry out the provisions of the franchise, if—

(i) the franchisee was apprised by the franchisor in writing of such failure and was afforded a reasonable opportunity to exert good faith efforts to carry out such provisions; and

(ii) such failure thereafter continued within the period which began not more than 180 days before the date notification of termination or nonrenewal was given pursuant to section 104 [15 USCS § 2804].

(C) The occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable, if such event occurs during the period the franchise is in effect and the franchisor first acquired actual or constructive knowledge of such occurrence—

(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 104(a) [15 USCS § 2804(a)]; or

(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 104(b)(1) [15 USCS § 2804(b)(1)].

(c) Definition. As used in subsection (b)(2)(C), the term "an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable" includes events such as—

(1) fraud or criminal misconduct by the franchisee relevant to the operation of the marketing premises;

(2) declaration of bankruptcy or judicial determination of insolvency of the franchisee;

(3) continuing severe physical or mental disability of the franchisee of at least 3 months duration which renders the franchisee unable to provide for the continued proper operation of the marketing premises;

(4) loss of the franchisor's right to grant possession of the leased marketing premises through expiration of an underlying lease, if the franchisee was notified in writing, prior to the commencement of the term of the then existing franchise—

(A) of the duration of the underlying lease, and

(B) of the fact that such underlying lease might expire and not be renewed during the term of such franchise (in the case of termination) or at the end of such term (in the case of nonrenewal);

(5) condemnation or other taking, in whole or in part, of the marketing premises pursuant to the power of eminent domain;

(6) loss of the franchisor's right to grant the right to use the trademark which is the subject of the franchise, unless such loss was due to trademark abuse, violation of Federal or State law, or other fault or negligence of the franchisor, which such abuse, violation, or other fault or negligence is related to action taken in bad faith by the franchisor;

(7) destruction (other than by the franchisor) of all or a substantial part of the marketing premises;

(8) failure by the franchisee to pay to the franchisor in a timely manner when due all sums to which the franchisor is legally entitled;

(9) failure by the franchisee to operate the marketing premises for—

(A) 7 consecutive days, or

(B) such lesser period which under the facts and circumstances constitutes an unreasonable period of time;

(10) willful adulteration, mislabeling or misbranding of motor fuels or other trademark violations by the franchisee;

(11) knowing failure of the franchisee to comply with Federal, State, or local laws or regulations relevant to the operation of the marketing premises; and

(12) conviction of the franchisee of any felony involving moral turpitude.

§ 2805. Enforcement provisions

(a) Maintenance of civil action by franchisee against franchisor; jurisdiction and venue; time for commencement of action. If a franchisor fails to comply with the requirements of section 102 or 103 [15 USCS §§ 2802 or 2803], the franchisee may maintain a civil action against such franchisor. Such action may be brought, without regard to the amount in controversy, in the district court of the United States in any judicial district in which the principal place of business of such franchisor is located or in which such franchisee is doing business, except that no such action may be maintained unless commenced within 1 year after the later of—

(1) the date of termination of the franchise or nonrenewal of the franchise relationship; or

(2) the date the franchisor fails to comply with the requirements of section 102 or 103 [15 USCS §§ 2802 or 2803].

(b) Equitable relief by court; bond requirements; grounds for nonexercise of court's equitable powers. (1) In any action under subsection (a), the court shall grant such equitable relief as the court determines is necessary to remedy the effects of any failure to comply with

the requirements of section 102 or 103 [15 USCS §§ 2802 or 2803], including declaratory judgment, mandatory or prohibitive injunctive relief, and interim equitable relief. (2) Except as provided in paragraph (3), in any action under subsection (a), the court shall grant a preliminary injunction if—

(A) the franchisee shows—

(i) the franchise of which he is a party has been terminated or the franchise relationship of which he is a party has not been renewed, and

(ii) there exist sufficiently serious questions going to the merits to make such questions a fair ground for litigation; and

(B) the court determines that, on balance, the hardships imposed upon the franchisor by the issuance of such preliminary injunctive relief will be less than the hardship which would be imposed upon such franchisee if such preliminary injunctive relief were not granted.

(3) Nothing in this subsection prevents any court from requiring the franchisee in any action under subsection (a) to post a bond, in an amount established by the court, prior to the issuance or continuation of any equitable relief.

(4) In any action under subsection (a), the court need not exercise its equity powers to compel continuation or renewal of the franchise relationship if such action was commenced—

(A) more than 90 days after the date on which notification pursuant to section 104(a) [15 USCS § 2804 (a)] was posted or personally delivered to the franchisee;

(B) more than 180 days after the date on which notification pursuant to section 104(b)(2) [15 USCS § 2804(b)(2)] was posted or personally delivered to the franchisee; or

(C) more than 30 days after the date on which the termination of such franchise or the nonrenewal of such franchise relationship takes effect if less than 90 days notification was provided pursuant to section 104(b)(1) [15 USCS § 2804(b)(1)].

(c) Burden of proof; burden of going forward with evidence. In any action under subsection (a), the franchisee shall have the burden of proving the termination of the franchise or the nonrenewal of the franchise relationship. The franchisor shall bear the burden of going forward with evidence to establish as an affirmative defense that such termination or nonrenewal was permitted under section 102(b) or 103 [15 USCS §§ 2802(b) or 2803], and, if applicable, that such franchisor complied with the requirements of section 102(d) [15 USCS § 2802(d)].